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75

# REPORTS OF CASES

DECIDED IN THE

*July 5*

## COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF APRIL 23, 1895, TO AND  
INCLUDING DECISIONS OF JUNE 14, 1895.

WITH

NOTES, REFERENCES AND INDEX

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By H. E. SICKELS,  
STATE REPORTER.

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JOHN C. GRAY,

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ASSOCIATE JUDGES.





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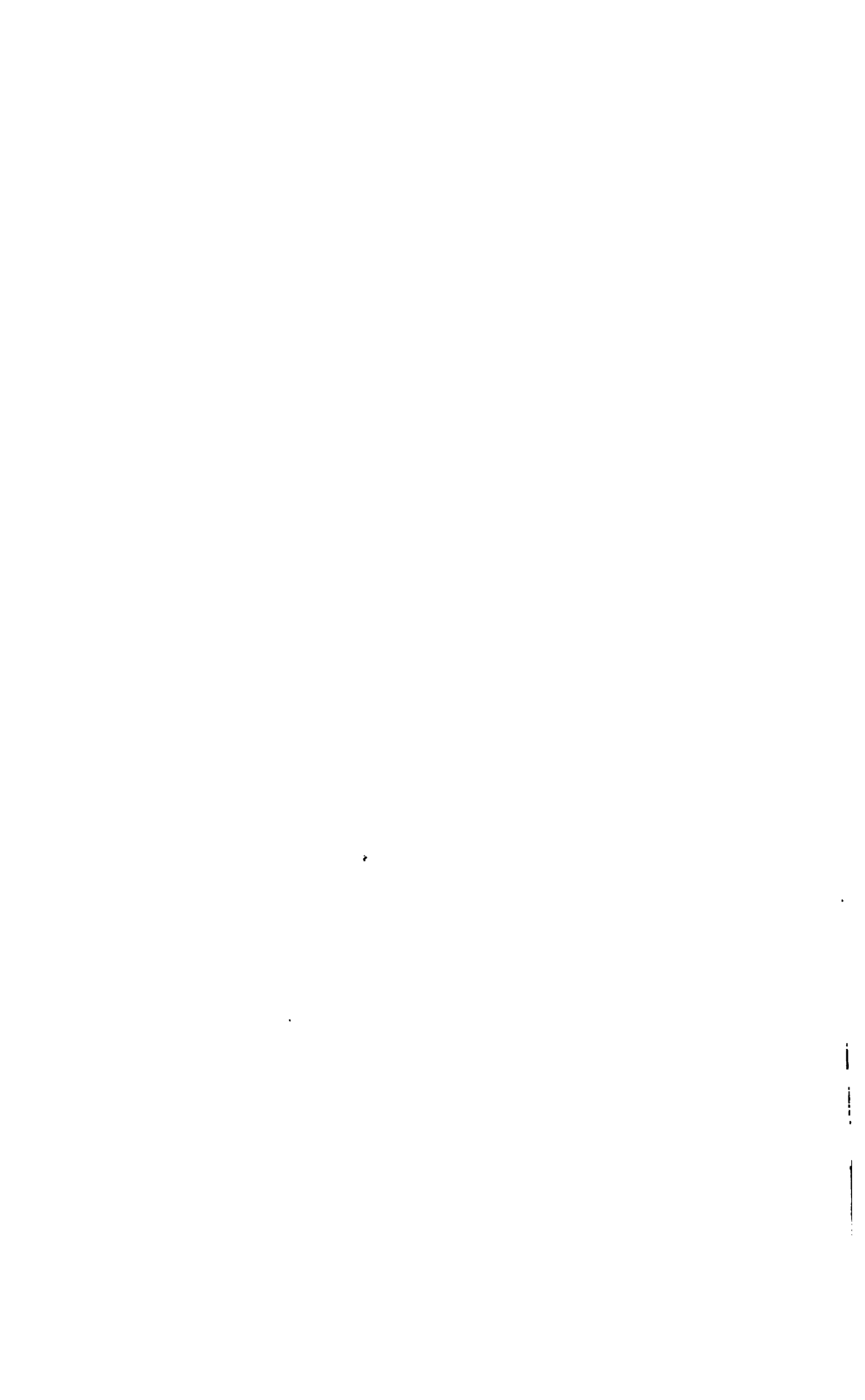
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CASES DECIDED  
IN THE  
COURT OF APPEALS  
OF THE  
STATE OF NEW YORK,

COMMENCING APRIL 28, 1895.

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UNITED STATES TRUST COMPANY of New York, as Trustee,  
etc., Respondent, *v.* JAMES DRAKE BLACK et al., Respond-  
ents, et al., Appellants.

By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company, which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is hereinafter disposed of." By other clauses, down to the seventh, separate and distinct bequests were made to a devisee named for life with remainder to others and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before-mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the con-

they may think for the best interest of my estate, and to convert the same into cash. \* \* \* Out of the proceeds of such sale or sales I order and direct my said executor to pay over the following amounts to the following persons and parties respectively ; and I do hereby give and bequeath the same as follows : " Here follow some twenty different bequests to legatees, in varying sums of ten thousand, five thousand and one thousand dollars, and amounting to more than one hundred thousand dollars. Among the provisions in the *seventh* clause, the testatrix provides for the payment of a sum to the plaintiff as trustee for Esther M. Behn during her life, and she then continues : " Upon her death I direct that the said trust fund shall fall into and be disposed of as part of my residuary estate." Another sum was provided upon similar trusts for Emily Hancock in this same *seventh* clause. The last provision of the *seventh* clause is as follows : " And I give to each of the grandchildren of Sarah A. Lawrence and Susan A. Drake one thousand dollars, if living at my death."

The *eighth* clause of the will reads as follows : "After the payment of the above-mentioned legacies and the provisions made as above directed for the annuities, I order and direct my said executor to pay over out of the residue of the proceeds of sale of my residuary estate the following legacies, which I give to the following persons and incorporations, viz. : " Then follows a list of some fifteen different charitable institutions to which are given legacies of \$5,000 each ; the clause then continues as follows : "All the rest and residue of my said residuary estate not herein otherwise disposed of I order and direct my said executor to pay over, and I give and bequeath the same to the above-mentioned James Drake Black, Mary Hopeton Drake and Mary Hopeton Smith absolutely, share and share alike." These three residuary legatees had already been named in the will as devisees of some portion of the estate of the testatrix.

By the *fourth* clause of the codicil of the testatrix the name of Hopeton Drake Atterbury was added to the three names above mentioned as residuary legatees, so that they con-

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sisted of four instead of three, as provided for in the will. The testatrix by the next clause of her will appointed an executor and revoked all other wills.

The property directed to be sold under the provisions of the *third* clause in the will of the testatrix was sold by the executor, and out of the proceeds of sale Mr. Evans accepted the amount of \$37,000 directed to be paid to him as full payment of the bond of the testatrix held by him, and a balance of a little over \$54,000 was realized and was paid by the executor to the plaintiff as trustee under the provisions of this *third* clause of the will. The trustee paid the interest arising from this sum to Mr. Evans up to the time of his death, which occurred a short time before the commencement of this action, and he left no issue surviving him, so that the provision in the *third* clause of her will by which, in that event, the testatrix ordered and directed that the principal of said trust fund shall "form part of my residuary estate, and the same to be disposed of as the same is hereinafter disposed of," comes into effect.

Proceeding to carry out the provisions of the will the executor sold the property of the testatrix other than that provided for in the clauses preceding the *seventh* clause of the will and there has been realized from the sale enough to pay all the legatees named in the *seventh* clause with the exception of five of those who are named in the last portion of said *seventh* clause as the grandchildren of Sarah Lawrence and Susan A. Drake. Five of those grandchildren have not been paid their legacies. As to most of the legacies named in the *eighth* clause nothing has been paid upon them and in the case of a few of those legatees a small portion only of the legacies given to them has been paid. The executor has become a defaulter and has absconded with nearly forty thousand dollars of the estate, and there is nothing now left with which to pay the specific legacies bequeathed to those various societies named in the *eighth* clause of the will unless this sum of \$54,000 now on deposit with the plaintiff trust company is applicable to their payment *pro rata* under the terms of the

will in question. The plaintiff asked the directions of the court as to the proper disposition of this fund.

The Special Term gave judgment directing the plaintiff after retaining proper compensation as trustee, etc., to pay this amount to the four last-named individuals in the *eighth* clause, who are determined to be the residuary legatees referred to in the *third* clause of the will and as such entitled to this money. The corporations named in the *eighth* clause appealed from that decree to the General Term of the Supreme Court, where the same was affirmed, and they have now appealed to this court.

*E. N. Taft* for American Seamen's Friend Society, appellant. The expression "my residuary estate," of which it is directed, in the third clause of the will, that the trust fund for James F. Evans should form a part, in case he should die leaving no issue, has reference to the residuary estate mentioned at the beginning of the seventh clause of the will, and not to the gift of "all the rest and residue of my said residuary estate" made to James Drake Black, Mary Hopeton Drake and Mary Hopeton Smith, as expressed at the close of the eighth clause of the will, nor to the same gift to James Drake Black, Mary Hopeton Drake, Mary Hopeton Smith and Hopeton Drake Atterbury, as given in the fourth (last) clause of the codicil. (*Cruikshank v. Home*, 113 N. Y. 354; *Floyd v. Carow*, 88 id. 567, 568; *Smith v. Smith*, 141 id. 34; *Riker v. Cornwall*, 113 id. 127.) The claim that the question as to the disposition to be made of the trust funds in question was adjudicated, either in the case of *Wetmore v. New York Institution for the Blind and Others*, or by the accounting had in the Surrogate's Court in proceedings instituted by the executor of the will of Mary Hopeton Drake, is not sustainable. (*Bell v. Merrifield*, 109 N. Y. 211; *Bailey v. Briggs*, 56 id. 413; *Collins v. Hydorn*, 135 id. 320.)

*Mornay Williams* for Baptist Home Society, appellant. In the construction suit no question was, or could have been,



raised by the executor as to the fund now under consideration. (*Bailey v. Briggs*, 56 N. Y. 407; *Dill v. Wisner*, 88 id. 153; *In re Clark*, 62 Hun, 275.) So far from it being the intention of the testatrix in the will under consideration, that the residuary estate referred to in the third paragraph of her will should be limited to the ultimate remainder passing to the defendants James Drake Black, Mary Hopeton Drake, Mary Hopeton Smith and Hopeton Drake Atterbury, it is quite manifest this was not her intention. (*Wetmore v. St. Luke's Hospital*, 56 Hun, 313.)

*Robert S. Minturn* for the New York Female Auxiliary Bible Society *et al.*, appellants. The principal of the trust fund is applicable to the satisfaction, in the order of their respective priorities, of all valid general pecuniary legacies, before any payment can be made to the residuary legatees. (2 Redf. on Wills, 115; *In re Benson*, 96 N. Y. 499; *Riker v. Cornwell*, 113 id. 115; *Cruikshank v. Home for the Friendless*, 113 id. 337; *In re Crossman*, Id. 503; *In re Bonnett*, Id. 522; *Lamb v. Lamb*, 131 id. 227; *Smith v. Smith*, 141 id. 29.) The disposition to be made of the present trust fund is not *res adjudicata*. (*R. E. Bank v. Eames*, 1 Keyes, 588; *Cochrane v. Schell*, 64 Hun, 576; *Collins v. Hydorn*, 135 N. Y. 320.)

*A. R. Dyett* for Presbyterian Home for Aged Women, appellant. If the question whether the judgments of the Special and General Terms on the action brought by Wetmore, the executor, to construe the will were, or whether either of them was, an adjudication upon the question to determine which this action is brought, is before this court on this appeal, we insist that neither of those judgments was such an adjudication. (*Laning v. N. Y. C. R. R. Co.* 49 N. Y. 521; *Mason v. Alston*, 9 id. 28; *Belden v. State*, 103 id. —; 31 Hun, 409; *Coutenat v. Feakes*, Edw. Ch. 330; *March v. Master-ton*, 101 N. Y. 401; *Canhape v. Parke*, 121 id. 152; *Stannard v. Hubbel*, 103 id. 520; *People v. Hall*, 104 id.

10. The court erred in holding—that no one of the defendants has any interest in the principal or interest of the trust estate above mentioned, except the residuary legatees mentioned in the fourth clause of the will of the said will of Mary Hopson Drake, deceased, to-wit, the defendants James Drake Black, Mary Hopson Drake, Mary Hopson Smith and Mary Hopson Amersbury.” 2 R. S. 730, § 67; *Williams on Ex.* [5th ed.] 1859.

*J. Van T. Dwyer and Herbert Barry*, for Domestic and Foreign Missionary Society, appellant. The claim that the defendants are estopped by the judgment entered in the suit of *Wetmore v. New York Institution for the Blind* cannot be maintained. (*Horne v. Lockwood*, 137 N. Y. 290; *People v. Johnson*, 38 Id. 63; *Reynolds v. Reynolds*, 140 U. S. 254; *Dill v. Wagner*, 55 N. Y. 153.) In ascertaining the intention of the testatrix, the will should be construed as a whole, and all of its provisions should be looked to in ascertaining the intention as to the language of any particular provision or clause thereof. (*Horne v. Lockwood*, 3 Barb. Ch. 506; *Furman v. Colt*, 96 N. Y. 67.) Where a legacy lapses which is given out of the general body of the estate, it will fall into the residuary estate; but that where a residuary legacy lapses it does not pass again into the residuary estate, but passes as intestate property, the rule being that a residue of a residue does not fall into the residuary estate. (*In re Benson*, 96 N. Y. 509; *Booth v. Baptist Church*, 126 id. 215.)

*Cephais Brainerd, Jr.*, for Young Men's Christian Association, appellant. The claim that it was the intention of the testatrix that the Evans fund should fall into the ultimate residuum is contrary to the general scope and plan of the will. (*Wetmore v. St. Luke's Hospital*, 56 Hun, 313.)

*William H. Harris and E. L. Fancher* for New York Institution for Deaf and Dumb, appellant. The fund formed

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part of the residuary estate. (*Banks v. Phelan*, 4 Barb. 90; *King v. Strong*, 9 Paige, 54; Redf. on Sur. [4th ed.] 588; *Fairer v. Park*, L. R. [3 Ch. Div.] 309; *Taylor v. Taylor*, 4 Hare, 628; *Lewis v. Darling*, 16 How. 10.) The gift to the four legatees was only of such part of the residue as was not otherwise disposed of. (*Wetmore v. St. Luke's Hospital*, 56 Hun, 317.) If any abatement is proper, it should be imposed upon the fund that goes to the residuary legatees and not upon the general legatees, who are entitled by law to be first paid. (*In re Benson*, 96 N. Y. 510; *Blair v. Lamb*, 2 J. & W. 406.)

*Alexander B. Crane* for Atterbury *et al.*, appellants. These appellants, legatees under the seventh clause of the will, are to be paid before those under the eighth clause, including the residuary legatees, are paid. The intention of the testatrix by the words: "Then I order and direct that the principal of said trust fund shall form part of my residuary estate, and that the same be disposed of as the same is hereinafter disposed of" is that, in the event of Evans' death without issue surviving him, the fund shall go to the executor as part of her residuary estate, to be disposed of by him. (1 Redf. on Sur. 435; 2 Redf. on Wills, 452; 3 Jarm. on Wills, 704, 707.)

*James C. Carter* and *George H. Balkam* for respondents. The judgment in the former action is conclusive and binding on all parties to that action, and the question is *res adjudicata* as against them. (*Sheldon v. Edwards*, 35 N. Y. 279.) This fund should not be paid back to the executor, or any successor of his that may be appointed, but should be paid directly by the plaintiff trust company to the four residuary legatees. (*Smith v. Van Ostrand*, 64 N. Y. 278; *Trustees, etc., v. Kellogg*, 16 id. 83.)

PECKHAM, J. I think this judgment should be affirmed. The case seems to me a reasonably clear one. The whole estate of the testatrix was quite large and she made distinct

and specific devises of certain and separate portions of her real estate to different members of her late father's family, making provision at the same time in regard to each of them (with one or two probably inadvertent exceptions), for possible lapse or failure to take, so that in such case the devise should fall into and be disposed of as part of her residuary estate. Having made the provisions which are set forth in the will, up to the seventh clause, she then treated of the whole balance of her estate and provided for its substantially immediate sale. In describing that portion of her estate which remained after the disposition which she had made of her property in the preceding clauses of her will, she speaks of it in the seventh clause as "all the rest, residue and remainder" of her estate, both real and personal. By the use of such language it seems to us she did not mean that this portion of her property which she was providing should be sold and converted into cash, was to be regarded as her "residuary estate," within the meaning of that term as used by her in the third and other clauses of her will preceding the *seventh*. On the contrary, it was language which she was using for the purpose of creating a fund out of which was to come the payment of specific legacies to various persons and institutions. It is true she provided that the residue of her property should be sold, but it was only to create this fund. In the *seventh* clause the testatrix named certain persons and institutions who (out of these proceeds of sale) should be paid the sum specified, and she then provided in the *eighth* clause for the payment of the specific legacies therein named out of the balance of the proceeds of the sale ordered by her. All these specific legacies named in the seventh and eighth clauses of the will might be paid out of this fund and a balance still remain. Unless some disposition were made of a possible residuum, the will did not provide for a complete disposition of her property. What she called her "residuary estate" in one part of the seventh clause might, therefore, in that event, be to some extent undisposed of and there might be danger of the testatrix, as to such residue, dying intestate. The language now alluded to and contained

in the latter part of clause *eight* prevents the happening of this event, for it disposes of "all the rest and residue of my said residuary estate not herein otherwise disposed of," by giving the same to the legatees therein named. Undoubtedly, when the testatrix here uses the expression "all the rest and residue of my said residuary estate not herein otherwise disposed of," she refers to that portion of her estate which was the proceeds of the sale of the property directed to be made by virtue and under the provisions of the *seventh* clause of the will of the testatrix, and which was in some sense her residuary estate, and these four persons would not, under that language alone, take this fund. But this last provision in clause eight makes a true residuary estate, and these are true residuary legatees, because in addition to language which gives them the residuum of that property, they would, in the contingency specified, take the property described in the preceding clauses by virtue of the directions therein contained. The residuary estate referred to by the testatrix in the clauses preceding the seventh is, as we think, the residuary estate which she assumes will remain after the payment of these specific legacies referred to in the *seventh* and *eighth* clauses of the will. I have no doubt that such was the intention of the testatrix. She undoubtedly expected that her estate would prove sufficient to pay all those specific legacies which she provided for in the *seventh* and *eighth* clauses of her will. It cannot be supposed that she sat down and went through the form of disposing of property by will which she believed at the same time would be insufficient to pay such legacies. No such foolish and useless intent should be imputed to her. She believed that there would still be left a sum unprovided for, the disposition of which was to be made by this final provision already alluded to and which would dispose of a true and final residuum. Assuming that the testatrix supposed that the fund to be created from the sale of her property would be sufficient to pay these various legacies what other estate would exist than that which would remain after such payments? What other estate could she mean

when speaking of her "residuary estate" in the *seventh*, *third* and *fourth* clauses preceding the *seventh* clause, the estate which she was giving to these residuary legatees named in the last portion of the *third* clause? In a certain sense that portion of the estate she intended still in the *seventh* clause was a residuary estate, because she directed all of the estate to be sold and here to be disposed of out of a sale of the estate which she thus bequeathed to her as a fund for the payment of specific legacies, and the residue to these four persons. But when she is providing for a possible failure of any of the various legacies given in the *seventh*, *third* and *fourth* clauses, and directs that they shall fall into and form part of her residuary estate, to be disposed of as that estate is disposed of, I cannot doubt that in such case the residuary estate she speaks of and which she has in mind is that which she assumes will exist after payment of legacies, and which will go to these four residuary legatees above named. In the two trusts created by her in the *seventh* clause, there was a life tenant in each for whom the particular trust was created, and that life tenancy might remain for years, and it certainly cannot be believed that the testatrix had in mind a possible failure of assets to pay legacies, and the falling in of a life estate years after her death, and the application of the fund towards the satisfaction of these specific legacies. And it is to be noted that these two trusts are created in this very *seventh* clause where it is claimed the real residuary estate is therein provided for. The trust funds are raised out of a sale of the "rest, residue and remainder of" her estate, and yet she directs those trust funds after the death of the *cestui que trust* to be disposed of as part of her "residuary estate." Is it not plain that she means by those words, that residuary estate mentioned in the latter part of clause *eight*? This construction adds strength to that contended for as the proper one in the *third* clause.

Various other reasons I think suggest themselves for the construction we give to the words "residuary estate" when used in the clauses of the will preceding the *seventh* clause, but it is not necessary to refer to them in detail. We cannot say, as a mat-

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ter of law, that testators always mean precisely and definitely the same thing when they use the same expression in different parts of their wills. It is a good rule to say that generally they do. It is always, however, a question of intention, and that intention the context or the facts surrounding the subject may show to be different in different places, although the same expression may be used in both. By virtue of the provisions made in the *third* clause of this will the fund therein spoken of must go to the four persons named in the latter portion of the *eighth* clause and in the codicil as residuary legatees, because I have no doubt that the testatrix so intended by the use at that time of the expression "residuary estate." Under this construction the charitable institutions have no title to any portion of this fund.

I have read the various briefs of the counsel who have appeared for these institutions and filed briefs in this court. They are exceedingly able presentations of their views. Without assuming to answer at length many of the objections to our construction of the will of the testatrix which are therein urged, we think none of them is tenable and that the judgments of the courts below should be affirmed, with costs to the plaintiff and the guardians *ad litem* of the infant defendants, payable out of the fund.

All concur.

Judgments affirmed.

EMMA L. HIRSH et al., by Guardian, etc., et al., Respondents,  
v. FREDERICK AUER, as Executor, etc., Appellant.

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Trusts may be created in personal property by parol, and to accomplish this no particular form of words is necessary.

It is not material that the trust agreement deals with a contingent interest; when the interest becomes vested and the trustee receives the fund the trust attaches to it.

H., the father of plaintiffs, at the time of his death held a policy or certificate of insurance on his life for \$2,000, payable, and which was paid, to his sister, C., the original defendant and the present defendant's testatrix. In an action to recover the amount so paid plaintiffs proved a parol agreement between H. and C., to the effect that when she collected the policy

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1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that are contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that are contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to solve the problem. Once a plan of action is developed, the next step is to implement the plan. This involves carrying out the steps that have been determined in the plan of action. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in solving the problem and whether any further action is needed.

[illegible]

**SECRET**

There is no judgment of the General Term of the Supreme Court in the Fourth Judicial Department entered upon an order made July 1, 1934, which affirmed a judgment in favor of plaintiffs entered upon a decision of the Court of Sessions of Westchester County.

The second was a gift of three of the children of John Brown, according to records of the proceeds of a public or private sale of some property in the incident of the United Workmen of which he was a member, which was made payable to Clara Anne a sister of our John.

2. Содержание и структура документа. Изучение содержания документа и его структуры. В документе 10 страниц. Структура документа следующая: 1. Введение. 2. Основная часть. 3. Заключение. 4. Приложение. 5. Литература. 6. Справочные материалы. 7. Заключение. 8. Приложение. 9. Литература. 10. Справочные материалы.

*T. K. Fuller* for appellant. No trust could be impressed upon the proceeds of the insurance in this case, by an agreement between the insured and the beneficiary made prior to the insurance. *Bondbury v. Clement*, 30 N. Y. S. R. 483; *Sabin v. Grand Lodge A. O. U. W.*, 3 Ed. 151; *M. B. Soc. of Real Men v. Clementine*, 44 M. L. 429; *Humberg v. Dist. No. 1 of I. O. of B. B.*, 94 N. Y. 580, 585; *Sabin v. Phoenix*, 134 N. Y. 433. The alleged oral declarations of the



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insured, proved only by being stated to the defendant by one of the plaintiffs, at the time the certificate was delivered to her, and her alleged admission, at that time, that such declarations were made by the deceased, are inadmissible to vary or contradict the terms of the certificate itself, and are insufficient to raise a trust in respect to the proceeds of said certificate. (*Wason v. Coburn*, 99 Mass. 342; *Dean v. Dean*, 6 Conn. 285; *Philbrook v. Delano*, 29 Maine, 410; Perry on Trusts [ed. 1882], § 76.) Evidence of the oral declarations of the deceased, made after the issuing of the certificate, are inadmissible to vary its construction; and mere statements that it was intended for the benefit of his three children are insufficient to constitute a trust. (*Wason v. Coburn*, 99 Mass. 342; *Sabin v. Phinney*, 134 N. Y. 423, 428.) Under the guise of a conversation with the defendant, two of the plaintiffs were permitted to give a conversation with the deceased, which conversation is excluded by section 829 of the Code. (Code Civ. Pro. § 829; *Davis v. Gallagher*, 124 N. Y. 487.) The motion to non-suit which was denied by the court should have been granted. (Laws of 1877, chap. 74, § 4; Laws of 1883, chap. 175; *Hellenburg v. Dist. No. 1, I. O. of B. B.*, 94 N. Y. 580, 585; *Bishop v. G. L. E. O. of M. A.*, 112 id. 627, 636; *Sabin v. G. L. of A. O. U. W.*, 6 N. Y. S. R. 151; *Sabin v. Phinney*, 134 N. Y. 423; *Boasburg v. Cronan*, 30 N. Y. S. R. 483; Bacon on Ben. Soc. § 237.)

*C. L. Stone* for respondents. The agreement upon which this conclusion is based is in no way contrary to public policy, and is in violation of no rule of law. On the contrary, its object was most laudable, namely, the provision by a father for the care of his infant children. The intent of the father will be carried out if possible. (*Silvey v. Hodgdon*, 52 Cal. 363.) The fact that the agreement for the disposition of this fund was by parol in no wise invalidates it. When once proved, it is just as binding as though evidenced by the written contract

of the parties. (*In re Carpenter*, 131 N. Y. 86; 1 Perry on Trusts [2d ed.], § 86; *Day v. Roth*, 18 N. Y. 448; *Gilman v. McArdle*, 99 id. 451; *Barry v. Lambert*, 98 id. 300; *Norton v. Mallory*, 63 id. 434.) The fact that the beneficiary received no vested interest in the beneficiary fund until the death of the insured constitutes no reason why the agreement should not be enforced. (*Phippard v. Phippard*, 55 Hun, 433; *Hagarty v. Hagarty*, 9 id. 175; *Stover v. Eycleshimer*, 3 Keyes, 620; *Field v. Mayor, etc.*, 6 N. Y. 179; *Hall v. City of Buffalo*, 1 Keyes, 193.) The admission of the defendant that she was to receive the fund under this agreement and pay it to these plaintiffs, made after the death of John Hirsh and after her interest had become a vested and absolute one, was sufficient to constitute her a trustee. (*Neilly v. Neilly*, 23 Hun, 651; *Day v. Roth*, 18 N. Y. 448.) The testimony of Mary Hirsh that she told her aunt what her father had said to her about the insurance, and that her aunt said that was so, was given for the purpose of proving the admission of the defendant, and for that purpose it is entirely competent. (Code Civ. Pro. § 829; *Card v. Card*, 39 N. Y. 317; *Raynor v. Timerson*, 46 Barb. 518.) The exception to the reception of the evidence of Charles Hirsh is not well taken. (*Connelly v. O'Connor*, 117 N. Y. 91; *Smith v. Meaghan*, 28 Hun, 423.)

BARTLETT, J. John Hirsh, deceased, the father of the plaintiffs, was, at the time of his death, a member of the society known as the Ancient Order of United Workmen, and held its certificate of insurance upon his life for \$2,000, payable to his sister, Clara Auer.

The plaintiffs are the children of the insured, and sued the beneficiary to recover the \$2,000 collected by her on the certificate of insurance upon the ground that she agreed with her brother, John Hirsh, that when she received the money on the policy she would expend not to exceed \$500 of it in paying his funeral expenses and for a monument, and would divide the \$1,500 equally between his children, the plaintiffs.

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Clara Auer, the beneficiary, was living at the time this action was commenced, but died since the trial, and her executor is now defendant.

The cause was tried at the Circuit without a jury and a judgment rendered in favor of plaintiffs for \$1,500, interest and costs.

The General Term affirmed the judgment.

Assuming that the evidence introduced by plaintiffs was competent, we cannot say there was legal error in the findings of fact, and the decision of the court below is conclusive as to the facts.

The learned counsel for the defendant has argued with great earnestness and ability several grounds of legal error which he insists must lead to the reversal of this judgment.

The first ground relates to the admissibility of evidence which was most important in its bearing upon plaintiffs' contention that the insurance money to the extent of \$1,500 was held by Clara Auer for their benefit.

John Hirsh died February 24th, 1892, and had in his possession at that time the certificate of insurance.

On the 2nd of March following two of the plaintiffs, Mary Ann and her sister Emma, called on their aunt, Clara Auer, the beneficiary named in the certificate, and delivered the same to her.

At the trial Mary Ann was put upon the stand by plaintiffs' counsel, and against the objection and exception of defendant allowed to testify that when she delivered to Clara Auer the certificate of insurance she informed her that John Hirsh, the insured, had told witness that he had an understanding with Clara Auer, when he had the policy made in her name, that when he died she was to pay his funeral expenses and erect a monument over his grave not to exceed \$500, and divide the balance equally among the plaintiffs, and that Clara Auer said in reply: "That is right; that is right, Mamie; that is right. Your father told me this; that was the understanding when your father had the policy changed into my name."

Defendant's counsel insists that under the guise of a conversation with the defendant two of the plaintiffs (Emma having sworn to the same transaction) were permitted to give a conversation with the deceased, which was incompetent under section 829 of the Code of Civil Procedure.

We are of opinion that this evidence was competent as tending to prove an admission of Clara Auer against her interest, she being alive at the time of the trial.

This was not an effort on the part of the plaintiffs to show a personal transaction or communication between the witness Mary Ann Hirsh and her father, and consequently section 829 of the Code has no application.

It was competent to prove this admission of the defendant Clara Auer, and in order to do so the entire conversation between the witness and defendant was material as pointing out the nature of the admission.

The only legal effect of this evidence was to prove the admission of the defendant, and it was properly received and considered by the trial judge.

Certain evidence of Charles Hirsh, a son of the insured, was also objected to under section 829 of the Code.

The witness was not so interested as to prevent his testifying; he was not a party and had no present or vested interest in the event of the action. (*Connelly v. O'Connor*, 117 N. Y. 91.)

Another alleged ground of error is based upon the proposition that no trust could be impressed upon the proceeds of the insurance by an agreement between the insured and the beneficiary, made prior to the insurance.

We see no legal objection to the agreement made by the insured and the beneficiary in this case.

It in no way interfered with the contract rights of the society issuing the certificate of insurance, nor did it vary the certificate in any manner; the insurance was paid to the beneficiary named and the agreement was in harmony with the objects of the society.

The original certificate was payable to the wife of the insured, and when she died John Hirsh selected his sister to

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act as beneficiary and disburse the insurance money in the manner indicated, for the benefit of his infant children.

It was competent for Clara Auer to agree with her brother that she would receive the proceeds of his life insurance, subject to such a trust as he might create. The fact that the insured could have at any time changed the beneficiary named in his certificate has no bearing upon the question as now presented; he did not, as a matter of fact, exercise that right, and his sister collected the insurance impressed with the trust created by the agreement, which the trial court has found was made by the parties in interest.

Trusts may be created in personal property by parol, and no particular form of words is required to accomplish the result. (*Matter of Carpenter*, 131 N. Y. 86, and cases cited.)

The statutes of this state do not define the objects for which trusts in personal property may be created, and if they are not against public policy and do not contravene any existing provisions of law they will be enforced.

The fact that the trust dealt with a contingent interest of the insured in the certificate of insurance is of no moment; that interest became vested at the death of the insured, and the beneficiary having collected the insurance money, the trust under the agreement creating and acknowledging it, attached to the fund.

A trust of this character is not to be distinguished from assignments of contingent interests which courts of equity recognize as valid. *Field v. Mayor of New York*, 6 N. Y. 179; *Stover v. Eycleshimer*, 3 Keyes, 620.)

Courts of equity will enforce a trust, created by the agreement of a legatee under a will, who takes what appears to be an absolute gift on the face of the instrument. (*Matter of Will of O'Hara*, 95 N. Y. 403, and cases cited.)

The other points and exceptions in the case have been examined, but need not be discussed in detail, as we are satisfied the judgment below was right and should be affirmed.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THOMAS W. ROBERTSON, Appellant, v. THE ONGLEY ELECTRIC  
COMPANY, Respondent.

In an action upon a promissory note, executed in this state by defendant, a New Jersey corporation, payable by its terms two years from date, these facts appeared: At the time of the giving of the note defendant, to secure its payment, executed a chattel mortgage upon certain personal property specified therein, situate in New Jersey. The mortgage provided, among other things, that in case the mortgagor "permit or suffer any attachment or other process against property to be issued against it," that the debt secured "shall become instantly due and payable." About four months after the execution of the note an attachment was issued in an action against defendant in this state, which was levied upon some of its property here, and thereupon this action was brought. *Held*, that the property referred to in the provision as to attachments was that described in and covered by the mortgage; and so that, as no portion thereof had been levied upon by virtue of the attachment, the condition was not broken and the note was not due when the action was commenced.

(Argued April 15, 1895; decided April 23, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Special Term.

This was an action upon a promissory note.

The facts, so far as material, are stated in the opinion.

*Treadwell Cleveland* for appellant. This action is not prematurely brought. (*Herrman v. M. Ins. Co.*, 81 N. Y. 188; *Westcott v. Thompson*, 18 id. 145; *Ward v. Whitney*, 8 id. 446; *Savage v. H. Ins. Co.*, 52 id. 502; *Rohrbach v. G. Ins. Co.*, 62 id. 63; *O'Brien v. C. F. Ins. Co.*, 63 id. 112; *Campbell v. Bank*, 2 Biss. 423; *Roffey v. Bent*, L. R. [3 Eq.] 759; *Hipkins v. G. L. Co.*, 5 H. & N. 75.)

*Rufus W. Peckham, Jr.*, for respondent. The defendant did not permit or suffer an attachment to issue against its

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property, and the complaint was properly dismissed. (*Comm. v. Curtis*, 9 Allen, 266; *Gore v. Lloyd*, 12 M. & W. 463; *Gibson v. King*, 1 C. & M. 458; *Shaffer v. Greer*, 87 Penn. St. 371; *Campbell v. T. N. Bank*, 2 Biss. 423.)

O'BRIEN, J. The only question involved in this appeal is whether the note upon which the action was brought was due, and this depends upon the construction which should be given to the instrument which accompanied it.

The action was upon a promissory note made by the defendant of \$22,783.33, dated New York, Nov. 1, 1892, payable two years after date to the plaintiff's order in the city of New York, with interest at five per cent. The action was commenced on April 4, 1893, about five months after it was made. The defendant is a New Jersey corporation, with its principal office and place of business in that state, but doing business in New York. On March 20th, 1893, a suit was brought against the defendant by a third party, by attachment in the Supreme Court of New York, which was levied upon some of its property in this state, and was in force at the time of the commencement of the present action. It is claimed by the plaintiff that under the terms of an instrument, referred to hereafter, and by reason of these facts, the note became due when the attachment was levied, though the claim upon which it was procured is denied by the defendant and resisted by a defense in the action. The trial court dismissed the complaint and the judgment has been affirmed at General Term.

The instrument referred to is a chattel mortgage, bearing even date with the note, whereby the defendant conveyed to the plaintiff certain personal property therein described, situated in the state of New Jersey, upon condition, however, that in case the defendant paid the note and interest, according to its terms, the transfer should be void, and then follows the clause upon which the plaintiff relies to support its contention that the note was due in these words:

"And the said party of the first part, for itself and its successors and assigns, covenants and agrees to and with the said

party of the second part, his executors, administrators and assigns, that in case default shall be made in the payment of the said principal sum above mentioned, or in the payment of the interest thereon, or in case the said party of the first part shall at any time before the day of payment herein provided for, remove the said goods, chattels and property, or any part thereof, or permit or suffer any attachment or other process against property to be issued against it, or permit or suffer any judgment to be entered up against it, then the said principal sum above mentioned shall become instantly due and payable, and then it shall and may be lawful for, and the said party of the first part does hereby authorize and empower the said party of the second part, his executors, administrators and assigns, with the aid and assistance of any person or persons, to enter upon the premises of the party of the first part, and such other place or places whatever in which the said goods, chattels and property, or any part thereof, are or may be placed, and to take and carry away the said goods, chattels and property, and to sell and dispose of the same either at public auction or private sale, without notice thereof to the party of the first part, its successors or assigns, and out of the money arising therefrom to retain and pay the said principal sum above mentioned and interest, and all charges touching the same, rendering the overplus, if any, unto the said party of the first part, its successors or assigns."

The subject-matter of this instrument was the personal property transferred in security of the debt. It is conceded that all of its language relates to this subject, except the words "or permit or suffer any attachment or other process against property to be issued against it, or permit or suffer any judgment to be entered up against it." The contention in behalf of the plaintiff is that whenever an attachment issued and was levied upon any of the defendant's property, wherever situated, without regard to the validity of the claim upon which it was procured or its amount, or the court or jurisdiction from which it proceeded, then these conditions were broken, and the note became instantly due, although the prop-



erty mortgaged was not affected. This interpretation is based upon a literal reading of the clause in the mortgage. The purpose which the parties had in view and the real matter in hand was the protection of the mortgaged property from invasion or disturbance by third parties through legal process which would endanger the security and put the mortgagee to trouble and expense in defending it. This was the subject in the minds of the parties, and, though the words would seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view. The parties were inserting conditions calculated to secure the mortgaged property and that alone; but, by the generality of the language used, these conditions are made to apply to other property and to all the property the defendant had, wherever situated. In such cases the general words will be confined to the subject-matter and to the particular occasion. (*Van Hugen v. Van Rensselaer*, 18 Johns. 423.) They should not be taken in their broadest sense, but in that in which it is reasonable to suppose they were used and understood by the parties themselves. The contention of the learned counsel for the plaintiff, when pushed to all its results, and when all its possibilities are given full scope, means that the parties have stipulated that this note should become presently due whenever an attachment should be issued and levied on the defendant's property on a claim of five dollars or any other nominal amount by a justice of the peace in any state or county where the defendant happened to be at the time doing business. It is quite certain that the parties had no intention to bring about such a result, and, if they have used some general words which would seem to give support to such a view, they will be limited to the subject-matter of the contract, which was the identical property described in the mortgage. It is apparent that a period of credit was intended to be given, but, if we adopt the plaintiff's contention, the note was practically payable on demand, since it would fall due at any time when an attachment was levied on the defendant's property anywhere, for ever

so insignificant a claim, whether valid or not. Attachments are easily obtained against foreign corporations, and in the case of a concern having business transactions in many states and even in foreign countries, the event which made the note due, upon the plaintiff's contention, could readily be brought about at any time. But giving such an extreme and unreasonable construction to the words used would result in placing the maker of the note completely in the power of the holder and this is to be avoided if possible (*Russell v. Allerton*, 108 N. Y. 288; *Wright v. Reusens*, 133 id. 298; *Halpin v. Ins. Co.*, 120 id. 73; *White v. Hoyt*, 73 id. 505), and is avoided by limiting the meaning and application of the word "property" to the property described in the preceding part of the instrument. We must read the whole instrument, and when we find the parties using a certain word or expression in different parts of it, it is reasonable to suppose that it was always used in the same sense unless a different meaning was plainly intended, and if the meaning is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others. (2 Parsons on Cont. 501.) So general words which would seem to be used in a large or extensive sense may be narrowed and limited to what appears from the general scope of the contract to be the intention and object which the parties had in view. (2 Wharton's Law of Contracts, 664.) Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish.

On the contrary, as was said in *Coyne v. Weaver* (84 N. Y. 390), "a court may wrestle, if need be, with unwilling words to find the truth, or preserve a right which is endangered." We think, therefore, that the condition with respect to the issue and levy of an attachment, which was to make the note instantly due, applied only to process under or by virtue of which the mortgaged property or the possession thereof was to be affected, endangered or disturbed, and since it is

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undisputed that this event had not taken place when this action was commenced the condition, according to its true meaning, was not broken and the note was not due.

The judgment should be affirmed, with costs.

All concur, except PECKHAM, J., not voting.

Judgment affirmed.

CAROLINE S. WILKINSON, Respondent, v. HENRY EUGENE DAVIES, as Administrator, etc., Appellant.

Plaintiff leased to D., defendant's intestate, certain rooms in her house, with table board for himself and family, for a term stated, for seventy dollars per week, "with no deduction in case of absence." D. entered into possession, but soon thereafter abandoned the premises, which remained vacant for a time, and then were re-let. In an action to recover for the time the rooms remained vacant, *held*, that plaintiff's measure of damages was not limited to the profits she would have made had D. carried out his contract, but that she was entitled to recover the contract price.

(Argued April 17, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 12, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Byron Travers* for appellant. The rule of damages applied by the trial court was an erroneous one. All that plaintiff could recover was the profits she would have made had defendant carried out his contract. There was no evidence in the case from which such profits could be computed, and hence plaintiff should have recovered only nominal damages. (*Appleby v. Ins. Co.*, 54 N. Y. 253, 260; *Parr v. Village of Greenbush*, 112 id. 246; *Butler v. Butler*, 77 id. 472, 475; *Lord v. Thomas*, 64 id. 107; *Clark v. Marsiglia*, 1 Den. 317; *Sedg. on Dam.* [8th ed.] §§ 609, 610, 613, 618; *Devlin*

v. *Mayor, etc.*, 63 N. Y. 8; *Kidd v. McCormick*, 83 id. 391; *Wakeman v. W., etc., Mfg. Co.*, 101 N. Y. 205; *Kelly v. F. B. C. Co.*, 67 Barb. 183; *Lydecker v. Valentine*, 71 Hun, 194; *De Lavellette v. Wendt*, 11 id. 432; *Wetmore v. Jaffray*, 9 id. 140; *Wilson v. Martin*, 1 Den. 602; *Spencer v. Halstead*, Id. 606; *Tuers v. Tuers*, 100 N. Y. 196, 202; *Hemingway v. Poucher*, 98 id. 281; *T. N. Bank v. Darragh*, 3 T. & C. 138.) The judgment cannot be sustained because the agreement provided that "there should be no deduction from the contract price per week in case of absence." (*Dwight v. G. Ins. Co.*, 103 N. Y. 341; *Groat v. Gile*, 51 id. 431; *Pardee v. Fish*, 60 id. 265, 269.) The questions asked by plaintiff's counsel, attempting to prove her profits, were properly excluded. (*Tooley v. Bacon*, 70 N. Y. 34; *West v. Van Tuyl*, 119 id. 620; *Clark v. Post*, 113 id. 17, 27; *Vanderslice v. Newton*, 4 id. 130; *Wintermute v. Cooke*, 73 id. 107; *Squier v. Gould*, 14 Wend. 159; *Molony v. Dows*, 15 How. Pr. 261; *Parsons v. Sutton*, 66 N. Y. 96; *Thompson v. Gould*, 16 Abb. Pr. [N. S.] 424; *T. Co. v. Bradshaw*, 20 Ill. App. 1; *Milbank v. Jones*, 141 N. Y. 340; *Goodwin v. Wertheimer*, 99 id. 149; *Bruce v. Burr*, 67 id. 237; *Wangler v. Swift*, 90 id. 38.)

*William D. Leonard* for respondent. The complaint was good, and the motion to dismiss was properly denied. (*Kenny v. N. Y. C. R. R. Co.*, 49 Hun, 435; *Thayer v. Marsh*, 75 N. Y. 340.) The evidence establishes the cause of action. (*Wetmore v. Jaffray*, 9 Hun, 140.) Defendant cannot be heard to complain that plaintiff has failed to prove what it would have cost her to perform the contract. (*Bethell v. Matthews*, 13 Wall. 1.)

HAIGHT, J. This action was brought to recover for board and lodging furnished by the plaintiff to the defendant's intestate, Henry E. Davies.

It appears that the plaintiff let to Davies rooms on the second floor of her residence, No. 34 West 51st street in the

city of New York, consisting of a parlor, two bed rooms and connecting bath for the occupancy of himself and family, consisting of a wife and son, from the 5th day of November, 1890, to the first day of June, 1891, with table board for the sum of \$70 per week *with no deduction in case of absence*; that Davies entered into possession of the premises at the time mentioned and continued until Thanksgiving day, at which time he abandoned the premises and went away. The premises remained vacant until the first of January, at which time the plaintiff re-let them to four people for \$75 per week. Davies paid for the time that he occupied the premises and no longer. A verdict was directed in favor of the plaintiff for the time that the premises remained vacant at \$70 per week, the contract price.

The appellant contends that an improper measure of damages was adopted, and that all that the plaintiff could properly recover under the circumstances were the profits she would have made had Davies carried out his contract. This would doubtless be the rule as to the measure of damages were it not for the provisions of the contract that no deduction should be made in case of absence. Here we have an express provision fixing the term, the amount to be paid per week without deduction, etc. Under such a contract we think the price agreed upon becomes the proper measure of damages. In this connection it is further contended that the provision "with no deduction in case of absence" should be construed to mean that there should be no deduction so long as Davies kept his agreement, but this construction would permit Davies to avoid the provisions of the contract by his own breach thereof, and such it does not appear to us was the intention of the parties. But suppose we should so construe it. We find no evidence in the record that Davies ever terminated the contract, or that he gave notice that he would no longer occupy the premises. He left and went away, it is true, but he might have returned the next day, the next week, or even the next month, and continued his occupancy of the premises, and the plaintiff in the meantime would be required to keep his

rooms ready for him. Under such circumstances it would appear to be unjust to deprive the plaintiff of the benefit of her contract.

It further appears that upon the trial the plaintiff offered to show her profits from the people that occupied the premises after the first of January, and as to whether they were greater or less than that which she would have derived from Davies had he continued to occupy them. This was objected to by the defendant without stating any grounds for the objection, and the same was sustained. She further attempted to show what it would have cost her per week to provide table board for Davies and his family. This was also objected to by the defendant and the evidence was excluded. Had this evidence been received it might have appeared that the plaintiff's profits from the four boarders after the first of January were the same as they would have been had Davies and his family continued to occupy the premises, and that the plaintiff's expenses in providing table board for Davies and his family were \$15 or \$20 per week, from which a deduction might have been made from the contract price of \$70 per week. But the defendant interposed an objection to this evidence and caused it to be excluded. After so excluding it, we think he is in no position to insist that the plaintiff's recovery be limited to her profits. As we have seen, no ground was stated for the objections to the evidence. The complaint was in due form to recover for board and lodging. If, upon the trial, the plaintiff consented to forego her claim to the contract price of \$70 per week without deduction in case of absence, and permit a deduction therefrom of her costs for table board, the defendant ought not to complain, or be permitted to defeat her right to recover, because the complaint did not demand that particular measure of relief.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

GEORGE A. CUNNINGHAM, Respondent, v. ALBERT PARKER et al., as Executors, etc., Appellants, et al., Respondents.

Where a devise contains a clause, in terms a condition, that the devisee pay certain legacies, in the absence of any provision for re-entry or forfeiture, or of anything to support an inference that the testator intended the estate to depend upon performance of the requirement, the words used will be held to import a covenant, not a condition.

D., by his will, after directing the payment of his debts by his executor, and after giving various legacies, devised and bequeathed all the residue of his estate, real and personal, to his son A., "on the condition and proviso that he pay" the said legacies within four years after the death of the testator, and the real estate so devised to A. was charged with the payment of the same. A. was appointed executor; he accepted the devise and went into possession of the real estate, but did not pay the legacies within the four years. At the death of D. his personalty was insufficient to pay his debts. In an action brought by creditors of the decedent under the Code of Civil Procedure (§ 1844, *et seq.*) to reach and apply the real estate to the payment of their debts, *held*, that the failure to pay the legacies did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the land so devised to him.

A., before the commencement of the action, procured a loan from H., and gave to him a mortgage upon the land to secure the same. H. took the same in good faith and without actual notice of unpaid debts. *Held*, that the lien of the mortgage was valid, and as between the holders thereof and the creditors the former were entitled to a preference in the payment of the mortgage out of the proceeds of the sale of the land.

(Argued April 17, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 19, 1894, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Emory A. Chase* for appellant. Such a construction should be given to the will as to prevent partial intestacy. (2 Redf. on Wills, 442; *Schutt v. Moll*, 132 N. Y. 122; *Vernon v.*

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*Vernon*, 53 id. 351; *Provost v. Calyer*, 62 id. 210; *Byrnes v. Baer*, 86 id. 210; *Van Derpoel v. Loew*, 112 id. 167.) The will should be so construed as not to disinherit an heir. (*Scott v. Guernsey*, 48 N. Y. 106.) Such a construction should be given to the will, if possible, as to avoid a forfeiture. (*Graves v. Deterling*, 124 N. Y. 447; *Johnson v. Gurly*, 5 Tex. 222; *Hoyt v. Kimball*, 49 N. H. 322; *Board, etc., v. Trustees, etc.*, 63 Ill. 204; *Johnson v. Valentine*, 4 Sandf. 36.) Such a construction should be given to the will as to carry out the intention of testator. (*Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 154; *Bank of Montreal v. Ricknagel*, 109 id. 482; *Lindsey v. Lindsey*, 45 Ind. 552; *Graves v. Deterling*, 120 N. Y. 447; *Post v. Weil*, 115 id. 361.) The testator did not intend to make the payment of the legacies a condition precedent to the title vesting in Alexander. (*Post v. Weil*, 115 N. Y. 366; *Countryman v. Deck*, 13 Abb. [N. C.] 110; *Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 142; *Clement v. Burtis*, 121 id. 708; *Graves v. Deterling*, 120 id. 457.) The courts have already construed language similar to that in this will as a covenant and not a condition. (*Loder v. Hatfield*, 71 N. Y. 92; *Zweigle v. Holman*, 75 Hun, 377.)

*John A. Griswold* for respondent. By the condition of the devise of the farm to Alexander, the title to the farm under the will never did and never could vest in Alexander without performance of the conditions upon which it was devised. He was only devised the farm on the condition and proviso that he pay the legacies within four years after the death of the testator. (*Hogeboom v. Hall*, 24 Wend. 146; *Harris v. Fly*, 7 Paige, 421; *Birdsall v. Hewlett*, 1 id. 32; 4 Kent's Comm. 126-128; *Dodge v. Manning*, 1 N. Y. 298.) Whether the condition of the devise was precedent or subsequent, the land was vested in the heirs at law, and they were in possession at the time of the trial, and they only were interested in the proceeds. (*Plumb v. Tubbs*, 41 N. Y. 442; *Hogeboom v. Hall*, 24 Wend. 146; 4 Kent's Comm. 126, 130.) The debts of the testator were charged by the will on the real



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estate devised. (*Reynolds v. Reynolds*, 16 N. Y. 257; *Brown v. Knapp*, 79 id. 136.) The debts of the testator in this case were charged on the real estate because the testator must have known that the personal estate was entirely insufficient to pay his debts. (2 Perry on Trusts, 570; *Munson v. Munson*, 8 Abb. [N. C.] 123.) Hamilton when he took the mortgage had constructive notice of the terms of the will, the immediate source of title of his grantor, and, therefore, was not a purchaser in good faith under section 1853 of the Code. (2 Pom. Eq. Juris. §§ 626, 627, 628; *Hogeboom v. Hall*, 24 Wend. 146; *Elwood v. Diefendorph*, 5 Barb. 398; *Harris v. Fly*, 7 Paige, 421; Code Civ. Pro. § 2633; 74 Hun, 278.)

FINCH, J. The plaintiff's complaint is framed for a recovery under the provisions of the Code allowing actions against devisees or heirs at law for the purpose of applying real estate descended or devised to the payment of the general debts of the intestate or testator. There are two modes of reaching that result, differing in the form and character of the proceeding, and also in the scope of the ultimate relief. Within three years from the granting of letters creditors may apply to the surrogate by a petition setting forth the prescribed facts and asking for a sale of the land and an application of the proceeds. Such a sale carries the title of the decedents, unaffected by the acts of heirs or devisees, except that where no letters have been issued within four years after the death of the testator or intestate a purchaser or mortgagee from an heir or devisee in good faith and for value is protected. (Code, § 2777.) This proceeding was not taken by the creditors, and the prescribed three years having elapsed could not be taken, and so the creditors resorted to the second method provided and brought this action under section 1837 and those which follow. But the resulting sale has a greater respect for the rights of those claiming under the heir or devisee than is given by the proceeding within three years before the surrogate. If the land has not been aliened the debt may be collected out of it, and the judgment as a lien has priority over

a judgment against the heir or devisee for his individual debt or demand (§ 1852), but the right of a purchaser in good faith and for value is explicitly saved and protected although he claims under the heir or devisee. (§ 1853.) With this understanding we are prepared to consider the character of the remedy in its application to the facts disclosed.

The debtor and testator was Daniel Whitford. By his will he made a devise to his son Alexander in these words: "I give, devise and bequeath unto my beloved son Alexander Whitford all the rest, residue and remainder of my estate, both real and personal, of what nature or kind soever, to have and to hold the same to him, his heirs and assigns forever, on the condition and proviso that he pay to the above-named legatees respectively the legacies herein given within the period of four years after my decease, without interest; and the real estate so devised to my son Alexander Whitford is charged with the payment of the same." This devise the son accepted and went into possession of the land, becoming thereby liable to payment of the legacies, amounting to about one thousand dollars. Letters testamentary were issued to Alexander June 25, 1888. He borrowed of one Hamilton on April 1st, 1890, the sum of \$2,200, and secured the loan by his bond and a mortgage on the land devised, in which his wife joined. Hamilton is dead, but his executors defend in his behalf. Alexander is dead, leaving a widow and one daughter, Eldora, who is made a defendant. After his death the heirs of Daniel claimed the land as forfeited to them because of Alexander's omission to perform the condition of paying the legacies within the prescribed four years, and were let into possession under an arrangement not at all material since the mortgagee, whose rights are here involved, was no party to it and unaffected by it. Under a decree in this action the land has been sold, and the sole remaining controversy is over the priority of right in the proceeds as between the general creditors of Daniel and the holders of the Hamilton mortgage. The courts below have given a preference to the creditors, proceeding upon the theory that the devise to Alex-

ander was forfeited and the land descended to the five heirs of Daniel, of whom Alexander was one, and that as to four-fifths of the land the Hamilton mortgage was never a lien.

It was conceded, at least by the respondent's line of argument, that the judgment preferring the creditors to the mortgagee can only be sustained upon one of two theories: either that Alexander lost the premises by forfeiture, or that the general debts were by the will charged on the land. In the one case the mortgage lien is gone as to four-fifths of the land, and in the other is made by the will subject to the priority of the creditors; but if neither proposition be correct, it follows that the mortgagee, who has been found to have taken the security in good faith and for value and without actual notice of unpaid debts of the testator, can hold and enforce his lien against the creditors in the present action.

There is no room for reasonable doubt that the devise to Alexander, whether the condition of payment of legacies be deemed precedent or subsequent, did not involve a forfeiture as the consequence of a failure to pay. The whole subject was considered in *Graves v. Deterling* (120 N. Y. 447) and the authorities reviewed, and the existing rule was affirmed that where there is no provision for re-entry or forfeiture and nothing to support an inference that the estate was intended to depend upon performance of the condition the words used will be held to import a covenant and not a condition. Here there is no express provision for a forfeiture, no disposition consequent upon such a result or contemplating it in any manner, but on the contrary an explicit charge of the legacies upon the land in the hands of the devisee.

Nor is there any reasonable doubt that the will in this case did not, by its terms or language merely, operate to charge the debts upon the land. The contention of the learned counsel for the respondent is that the will first directs payment of debts and expenses by the executor, and then after bequeathing certain legacies gives the rest, residue and remainder to Alexander, who is made executor, and that the direction to him to pay operates to charge the debts upon the

land. There are some early cases which the learned counsel cites tending toward his conclusion, but the subject has been since discussed in this court in a great many aspects and the rule declared that such language, in and of itself, is not sufficient to produce the charge. In *In re Rochester* (110 N. Y. 159), that was said although there was the usual formal clause directing payment of debts, a general residuary clause, and an appointment as executor of one of the devisees of such residue. And the general subject was further discussed in *Brill v. Wright* (112 N. Y. 130). While it appears that at the death of Daniel Whitford his personal estate was insufficient to pay debts, it is not shown what his financial condition was when he made his will, or the disproportion, if any, between debts and assets. No such extrinsic facts were proved as to warrant the inference claimed, even if the question as to debts is identical with that as to legacies. (*Briggs v. Carroll*, 117 N. Y. 288.) Indeed, the plaintiff's complaint itself alleges that none of the debts were charged upon the land.

It follows that the distribution made proceeded upon a wrong principle and disregarded the rights of the mortgagee.

The judgment should be reversed so far as appealed from and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed. \_\_\_\_\_

SELIG MAASS et al., Appellants, v. ABRAHAM FALK et al.,  
Respondents.

The firm of F. Bros. & Co. being indebted to certain banks on promissory notes not yet due, and being in financial trouble, advised the banks of that fact, and entered into an agreement with them, in pursuance of which the banks surrendered the notes and received in place thereof the firm notes payable on demand, also an instrument in writing, by the terms of which the firm transferred to the banks as security all its stock in trade and fixtures, with authority to hold and sell the same and apply the net proceeds to the payment of the notes; any surplus to be paid over to the firm or its assigns. The banks took immediate possession of the property so transferred, sold the same and applied the net proceeds

146	34
148	280

146	34
154	699

146	34
e163	50
f163	52
163	350

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ratably to the payment of the notes, such proceeds not being sufficient to pay the whole indebtedness. In an action by certain judgment creditors of the firm to set aside the transfer as being fraudulent and void against creditors these facts appeared: On the next day after the transaction said firm executed to other creditors various similar transfers which, as a whole, covered all the remaining property of the firm. These transfers bore the same date as the one in question. No general assignment for the benefit of creditors was made by the firm. The trial court found that at the time of the transfer and delivery of the property to the banks neither of them had any knowledge of any other transfer or intended transfer by the firm, and that the transaction was without intent to hinder, defraud or delay creditors. *Held*, that the complaint was properly dismissed; that so far as the evidence disclosed there was no relation or connection between the transaction with the banks and those with other creditors, and so they could not be considered as one and the same transaction, and there was no violation shown of the prohibition of the General Assignment Act (§ 80, chap. 503, Laws of 1887) prohibiting preferences in such an assignment exceeding one-third of the value of the assigned estate.

*It seems*, that had there been a general assignment by the firm, and the transaction with the banks constituted an undue preference, plaintiffs' action was not the proper remedy; that instead of an action in their own behalf, it should have been in behalf of all the creditors excluded by the transfers from a share in the debtors' assets, to secure to them a ratable distribution of two-thirds thereof.

(Argued April 18, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 12, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term dismissing the complaint.

This is an action by certain judgment creditors of the firm of Falk Brothers & Co. to set aside, as being void and fraudulent as to them, a certain transfer of property, which had been made by the judgment debtors to the three defendant banks. The instrument of transfer referred to in the complaint, after reciting the indebtedness of Falk Brothers & Company to the three banks, proceeded to transfer to the banks all the goods, wares and merchandise, stock in trade and fixtures of Falk Brothers & Co. in their store, "to have and to hold to the said

banks as security for the said indebtedness to them respectively, with authority to the said banks to hold and sell the same at public or private sale \* \* \* and after payment of the expenses of such sales and the said indebtedness to said banks, with interest in full, or ratably, \* \* \* to render the overplus to said firm or its assigns." That instrument was made and dated on the 27th day of March, 1891, and under the following circumstances: The firm was indebted to the three defendant banks upon promissory notes in sums of money aggregating \$88,832. In the evening of March 27th, 1891, one of the firm of Falk Brothers & Company had a meeting with the representatives of the three banks at the house of his counsel; the banks having been informed that the firm was in financial trouble, through their Southern house. None of the promissory notes held by the banks were then due; but it was agreed that they should all be surrendered to the firm and that each bank should take back, in satisfaction of the notes surrendered, a note for the amount owing to it upon the notes surrendered, less the rebate of interest for the time they had to run. The payment of the three new notes was to be secured by a mortgage upon certain personal property belonging to the firm. That agreement was immediately carried into effect by the execution and delivery of three promissory notes to the three banks, payable on demand, with interest; by the surrender and satisfaction of the old notes and by the execution and delivery of the instrument above mentioned. The banks took immediate possession of the property mentioned in the instrument of transfer and in pursuance of its authority sold the same and applied the proceeds, ratably, to the payment of the amount owing to each upon their notes. The proceeds of the sale, after deducting expenses, were not quite sufficient to satisfy the indebtedness to the banks. It further appears that, upon the day following this transaction with the banks, the firm of Falk Brothers made several assignments to certain other of their creditors of various claims and accounts and they assigned to one of their firm, "as guardian," the overplus, if any, mentioned in

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each of such assignments, to pay the amount of an indebtedness mentioned. As the result of the transfers effected by all of these instruments, all of the property of Falk Brothers & Co. was appropriated to the discharge of their indebtedness to the particular creditors described. It was found as a fact by the trial court, that, at the time of the acceptance of the demand notes and the execution of the instrument in question and the delivery of the possession of the property therein contained, none of the defendant banks had any knowledge or notice of any other transfer, or intended transfer, of any property or assets by the defendants Falk. It was also found as a fact, that no general assignment of the estate of the defendants Falk, for the benefit of their creditors, was made by them; that the agreement between the defendants Falk and the three banks, and the transaction between them in pursuance of such agreements, were without any intent to hinder, or defraud, or delay the plaintiffs, or any creditor of the defendants Falk. The complaint was dismissed upon the merits at the Special Term and upon appeal to the General Term the judgment entered upon that dismissal was affirmed.

*Isaac H. Maynard* for appellants. The several instruments executed by the Falks and dated March 27, 1891, were, within the meaning of the law, a general assignment and, therefore, void, because not executed in conformity with the statute relating to general assignments for the benefit of creditors, and also because they secured to the creditors in whose favor they were executed a preference prohibited by the statute. (*U. S. v. Clark*, 1 Paine, 629; *Moore v. Church*, 70 Iowa, 208; *Winner v. Hoyt*, 66 Wis. 204; *White v. Cotzhausen*, 129 U. S. 329; *Tillon v. Britton*, 4 Halst. 138; *Horn v. Keteltas*, 46 N. Y. 605; *King v. Gustafson*, 80 Iowa, 207; *Sutherland v. Bradner*, 116 N. Y. 410; *Goodrich v. Downs*, 6 Hill, 438; *Barney v. Griffen*, 2 N. Y. 365; *Collomb v. Caldwell*, 16 id. 484; *Leitch v. Hollister*, 4 id. 211; *Knapp v. McGowan*, 96 id. 75; *Rogers v. Rogers*, 111 id. 228; *Bundy v. Bundy*, 38 id. 410; *Wetmore v. Truslow*,

51 id. 338; *Woodward v. James*, 115 id. 346; *Brown v. Chubb*, 135 id. 179; *Franklyn v. Haywood*, 61 How. Pr. 43; *Smith v. Roberts*, 91 N. Y. 470; *Sheldon v. Edwards*, 35 id. 279.) The transfers were a fraud upon the statute governing assignments. (*White v. Cotzhausen*, 129 U. S. 329; *Fields v. Geoghegan*, 125 Ill. 70; *Berger v. Varrellman*, 127 N. Y. 281; *Manning v. Beck*, 129 id. 1; *Spellman v. Freedman*, 130 id. 421; *Jones v. Howland*, 8 Metc. 377; *Power v. Allston*, 93 Ill. 587.) The finding of the trial court that the banks were ignorant of any further proposed transfer by the Falks is unsupported by the evidence. (*Parker v. Conner*, 93 N. Y. 118; *Vosburgh v. Diefendorf*, 119 id. 357; *Bank v. Diefendorf*, 123 id. 191; *King v. Doane*, 139 U. S. 166; *Lansing v. Stewart*, 104 id. 505; *Hale v. Shannon*, 57 Hun, 466; *Smith v. Livingston*, 111 Mass. 342; *Clements v. Moore*, 6 Wall. 299.) As the moneys received by the banks were received in pursuance of a scheme to obtain an illegal preference, the banks should be compelled to account to the plaintiffs for the entire proceeds of the sale. (*C. N. Bank v. Seligman*, 64 Hun, 615, 619.)

*S. B. Brownell, J. B. Talmage and Charles Strauss* for respondents. Upon the findings this is the simple case of a debtor agreeing with his creditor to further secure his indebtedness by a chattel mortgage without any element of fraud or circumstances from which fraud can be inferred. (*Manning v. Beck*, 129 N. Y. 1; *White v. Cotzhausen*, 129 U. S. 329; *L. S. B. Co. v. Fuller*, 110 Penn. St. 156; *Abegg v. Bishop*, 142 N. Y. 286; *C. N. Bank v. Seligman*, 138 id. 441.) No element of trust was contained in the grant to the banks. The title to the property vested in the banks only to the extent and for the purpose for which it was granted, viz., as security for the payment of the indebtedness to them respectively. Such provision never hinders creditors, because they may pay the mortgage debt and take the property or fasten on the surplus. (*Brown v. Guthrie*, 110 N. Y. 441, 442; *Greene v. Greene*, 125 id. 506.)



*B. F. Einstein* for respondents. The respondents, Falk Bros. & Co., as debtors, had the legal right to give a preference directly to their creditors, as was done in this case, in good faith, and this right which they had at common law was in no wise affected by the General Assignment Act of 1887. (*Manning v. Beck*, 129 N. Y. 1; *C. N. Bank v. Seligman*, 138 id. 441; *Abegg v. Bishop*, 142 id. 286.)

GRAY, J. I am not disposed to dispute the proposition of the appellants, which has been so ably argued by their counsel. If the transactions between the firm of Falk Brothers & Co. and the creditors of that firm, which resulted in transfers of all the firm property, had been simultaneous and it was plain that, in their guise, the debtor firm had, in fact, made a general assignment to favored creditors, then I should consider that there had been a violation of the provisions of the statute, regulating the assignments of the estates of debtors for the benefit of their creditors. The prohibition of the act of 1887 (Chap. 503, N. Y. Session Laws, sec. 30) against the creation of preferences, except to the amount of one-third in value of the assigned estate, cannot be evaded by resort to instrumentalities, which, however independent, are merely parts of a plan, through which certain creditors secure a preference in payment and the distribution of the debtor's assets as intended by the statute is prevented. Such a scheme between a debtor and some of his creditors would be as intolerable an evasion of the statute, as would be a transaction where the particular instrumentality, resorted to between the parties to secure the undue preference, was a transfer of property made independently, but in contemplation of a general assignment. If it were the fact that the defendant banks knew of their debtors' intention subsequently to accomplish an assignment of their whole estate to favored creditors, then we might regard the transaction with them, on the evening of March 27th, as one of the instrumentalities for evading the statute and for working a fraud upon creditors. But there was no general assignment under the statute by the Falks and the

finding to that effect is in accord with the facts of the case; although, as a matter of fact, through the various transfers, the debtors have disposed of all of their property.

The evidence does not bear out the plaintiffs' proposition, nor establish the existence of any scheme as between these banks and Falk Brothers. Before discussing that part of the case, I may observe that if it were true that the transaction with these banks constituted an undue and illegal preference and there was, as it is also in substance alleged and as it has been argued, a general assignment by the debtors Falk of their property, which was in evasion of the statute and in violation of its provisions simply because creating preferences contrary to the provisions of the statute, then the plaintiffs have not pursued, in my judgment, the proper remedy. In such a case they should come into the court and ask its equitable aid to secure to themselves and the other creditors, who were excluded by these instruments from a share in the debtors' assets, that ratable distribution of two-thirds thereof, which the act of 1887 intended they should in all events have. Otherwise they would by reason of their judgments obtain a preference in the payment of their debts, which they complain of as having been given by the debtors to other of their creditors. That is a position which a court of equity could not regard with any favor. The purpose of the statute is to prevent any preference, other than that for wages or salaries of employes, beyond one-third of the assigned estate and if that amount is exceeded, the penalty is not the annihilation of the assignment, but the reduction of the preference to the prescribed limit. (*Central National Bank v. Seligman*, 138 N. Y. 435.) Where that is the condition of affairs under a general assignment of the debtor's property, the remedy of creditors aggrieved by their debtor's act is by an action in aid of the assignment for the benefit of the body of creditors; if their rights are not asserted by the assignee. (*Spelman v. Freedman*, 130 N. Y. 421; *Bank v. Seligman*, *supra*; *Abegg v. Bishop*, 142 N. Y. 286.) In such a case the maxim *vigilantibus et non dormientibus jura sub-*

*veniant* cannot be invoked. It has application in cases where it is the policy of the law to reward enterprise and to punish indolence and negligence. It is needless to observe that it cannot be the policy of the law to encourage an activity, which would defeat one of its principal objects. But the difficulty with this case is that it is not borne out by the facts. Although the various instruments of transfer between the Falks and the defendant banks and between them and their other creditors, all, bore the same date, as matter of fact the transaction with the banks, alone, took place on the 27th of March, 1891; while the transactions with the other creditors were upon the succeeding day. So far as the evidence discloses, there was no relation, nor connection, between the transaction with the banks and that with the other creditors on the following day. None can be inferred from the similarity of the dates. The finding of fact was that at the time of the transaction none of the banks had any knowledge, or notice, of any other transfer, or intended transfer, of any property by the Falks. There is nothing in the evidence which shows, or tends to show, that knowledge and the burden upon the plaintiffs to give such proof was never shifted upon the defendants. The argument in answer assumes that the plaintiffs had shown that when the Falks executed their transfer to the banks, they contemplated insolvency and an evasion of the statute respecting assignments and that, therefore, it was for the defendants to prove their innocence of any participation in such a scheme. The assumption is wrong not only in the facts, but in the law. The proof simply showed that the Falks, finding themselves financially embarrassed, hastened to secure their indebtedness to the three banks upon the unmatured notes and accomplished it by taking up the existing notes and giving therefor notes payable on demand; payment of which was secured by a transfer or pledge of property; under the terms of which the banks were enabled to proceed, immediately, to take possession of the property covered and, by a sale, eventually, to satisfy nearly all

their indebtedness. There is not a word, nor an incident, to show that, at the time of this transaction, the Falks intended anything more than to secure the banks against loss upon the notes held. Whether they had in mind, at the time, the making of further transfers, afterwards; or whether that idea occurred to them subsequently does not appear and it is immaterial to the issue. The transaction was one to secure the payment of a valid and subsisting indebtedness and if the defendant banks were ignorant of any intention of their debtors to follow up the transaction by divesting themselves upon the next day of all control over the balance of their property, they cannot be said to have been participants in any scheme for the violation, or evasion, of the statute. The finding is explicit upon the question of knowledge and the case, therefore, in that aspect, and as one where the creditor simply obtains security for the payment of his honest debt, comes within the authority of *Manning v. Beck* (129 N. Y. 1). In that case the question was whether a creditor who procures a bill of sale from an insolvent debtor in payment of, or as security for, an honest and subsisting debt, and in ignorance of any intention on the part of the debtor to make thereafter a general assignment, can hold it as against the world; even though the property passing under the bill of sale exceeded one-third of the assets of the vendor. There a father transferred to his son, to whom he was indebted, a stock of goods and fixtures in a store by a bill of sale, in payment of the indebtedness. The next day the father made an assignment for the benefit of creditors to an assignee. The son knew that his father was insolvent, but did not know that he intended to make a general assignment. The preference thus intentionally given to the son was upheld. It was said that "the statute does not and was not intended to prevent a creditor from obtaining payment of, or a security, and thereby a preference, for his debt, even from an insolvent debtor and when a court is asked to set aside a security which is disconnected from and prior to any general assignment, on the ground that it is in violation of the act in relation to prefer-

ences in general assignments, it at once becomes a question whether the act was ever intended to cover a case, where the creditor \* \* \* was ignorant of any existing intention on the part of the debtor to thereafter perform an entirely separate act and make a general assignment. It does not, in terms, cover such a case, and we think it should not be thus extended by construction." The decision in *Manning v. Beck* is carefully reasoned out and shortens a discussion upon questions which were there considered.

In view of the findings and upon the evidence, the transfers of property to the defendant banks and to the other creditors cannot be regarded as constituting one transaction, or having one and the same general object. In the case of the debtors, there is nothing but surmise upon which an inference can be rested of an intention to evade the statute by preferring certain creditors through a series of separate assignments or transfers of property; while as to the defendant banks, there is no evidence to charge them with knowledge of any such intention, if it existed, and there is the express finding that they had no knowledge of any other intended transfer of property by the Falks.

The position of the appellants is weak in several respects. It incorrectly assumes that all the instruments were simultaneously executed. It regards the transfer of the property to the defendants as a mere trust assignment; whereas it was actually a pledge or mortgage of the property as security for an existing indebtedness. It assumes that the Falks made the transfer in contemplation of insolvency and with a design to evade the statute, without any evidence upon which the assumption might rest. It assumes the existence of evidence tending to prove as a fact an intention to hinder, delay and defraud creditors; when there was none, unless by treating the transfer to the defendants on March 27th and the subsequent transfers to other creditors upon the following day as one transaction; which, because preferring certain creditors to the extent of all their property, was in violation of law, or, as it is said, "a fraud upon the statute."

I think it needless to pursue further a subject, which in recent and successive decisions has been in effect covered by their discussions, in its several phases. (See *Berger v. Varrelmann*, 127 N. Y. 281; *Manning v. Beck*, 129 id. 1; *Central Bank v. Seligman*, 138 id. 435, and *Abegg v. Bishop*, 142 id. 286.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. \_\_\_\_\_

SHEPARD TAPPEN, Appellant, v. THE STATE OF NEW YORK,  
Respondent.

Under the provisions of the act in relation to public health (§§ 62, 63, chap. 661, Laws of 1893) authorizing the state board of health to cause to be killed any animal affected with tuberculosis, and directing the payment to the owner of "the actual value at the time of destruction of any animal" so killed, to be determined by the Board of Claims, the owner is not entitled to the value of the animal considered as sound and unaffected by disease, but simply its actual value in its diseased condition.

(Argued April 19, 1895; decided April 30, 1895.)

APPEAL from award by the Board of Claims, made September 12, 1894, which directed an award of \$1,400 in favor of the claimant.

The facts, so far as material, are stated in the opinion.

*Myer Nussbaum* for appellant. The actual value at the time of the destruction should be paid to the owner. Every presumption is in favor of compensating the owner where property is taken by the state. (Const. of N. Y. art. 1, § 6; *In re Jacobs*, 98 N. Y. 98.)

*T. E. Hancock, Attorney-General*, for respondent. The proper measure of damages was the actual value of the animals as affected by and liable to communicate tuberculosis on account of being brought in contact with other animals. (Laws of 1893, chap. 661, art. 4; *Dunlap v. Snyder*, 17 Barb.

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561; *Brown v. Hoburger*, 52 id. 15; *Smith v. Griswold*, 15 Hun, 273; *Whitney v. Taylor*, 54 Barb. 540; *Van Rensselaer v. Mould*, 48 Hun, 401; 1 Sedg. on Dam. [8th ed.] § 250.) The Board of Claims were not bound by the evidence of claimant's witnesses as to the value of the cattle destroyed, but were bound to take into consideration the testimony given concerning their diseased condition, and to use their own judgment in light of all the testimony given upon the trial, (*Koehler v. Adler*, 78 N. Y. 287; *Elmwood v. W. U. T. Co.*, 45 id. 549; *Head v. Hargrave*, 105 U. S. 49, 50; *Patterson v. Boston*, 20 Pick. 159, 166; *Murdock v. Sumner*, 22 id. 156.)

HAIGHT, J. A claim was filed by the appellant to recover the sum of \$3,645, damages for the killing of forty Jersey cattle, owned by him, by the board of health of the state pursuant to the provisions of chapter 661 of the Laws of 1893. Before the cattle were killed the claimant caused them to be appraised upon the basis that they were sound and unaffected by disease. Upon the trial the attorney-general offered in evidence, without objection, the official autopsies on file in the office of the board of health, of each animal slaughtered, from which it appears that each was suffering from the disease of tuberculosis. The board so found as a fact and awarded the claimant \$35 per head.

The only question which we are called upon to consider pertains to the measure of damages adopted by the board. Was the claimant entitled to the value of his cattle upon the basis that they were sound and unaffected by disease, or was he properly limited to the actual value in their diseased condition? It appears to us that the question is answered by the statute. It provides that "The actual value at the time of the destruction of any animal killed in pursuance of this article, not exceeding in the case of a horse affected with glanders the sum of fifty dollars, shall be paid to the owner thereof by the state; and the Board of Claims shall have exclusive jurisdiction to hear, audit and determine any such claim." (Laws of 1893, chapter 661, § 63.)

Actual value means the true value. True value depends upon the condition. If an animal is diseased it is not as valuable as it would be if sound, and its true value can only be determined upon full knowledge of all the facts connected with it.

It appears to us that the Board of Claims adopted the rule of damages provided for by the statute, and that the award should be affirmed, with costs.

All concur.

Award affirmed.

**EDWIN EINSTEIN, Appellant, v. THE ROCHESTER GAS AND ELECTRIC COMPANY et al., Respondents.**

There is no implied authority either in the officers, agents or stockholders of a corporation, to increase its capital stock, and this may only be done in the manner prescribed by its charter or by some express legislative authority.

Plaintiff's complaint alleged in substance these facts: R., plaintiff's assignor, being the owner of the exclusive right to sell certain patented machines and apparatus for electric lighting, entered into an agreement with certain persons for the organization of a stock company for the purpose of introducing that method of electric lighting in the city of Rochester. The agreement provided that forty-eight per cent of the capital stock of the corporation should be transferred to R. in consideration of his assignment to the corporation of his rights under the patents for Monroe county, and also forty-eight per cent of any increase of the capital stock. Defendant, the B. E. L. Co., the contemplated corporation, was thereupon organized, and by a contract executed between it and R., the latter assigned to it his rights under the patents for Monroe county, and it agreed that in case its capital stock should be at any time thereafter increased (save a specified amount of increase which might be issued and sold for cash) forty-eight per cent of such increase would be issued and delivered to R. The company was prohibited from selling any of its interests or rights without the consent of R., but the right of any stockholder to sell his stock was recognized. Subsequently R. assigned all his rights and interests to plaintiff. Thereafter a consolidation was proposed between said corporation and three other electric and gas light corporations in said city, but was abandoned because plaintiff would not waive his right to the forty-eight per cent of increase of stock; thereupon the three other corporations consolidated, and the new corporation thus organized



purchased all the stock of the B. E. L. Co., giving in exchange for each share so purchased five shares of its own stock, and thus it acquired the control and practical ownership of all the properties of the B. E. L. Co.; the corporate organization of the latter, however, was kept up, although the persons constituting its board of directors were also directors of the consolidated corporation. Plaintiff claimed that the new corporation had thus "completely absorbed," and was, to all intents and purposes, the old corporation, and that through the process by which the capital stock of the latter was acquired by the former there was an increase of such capital stock, and that plaintiff was entitled to forty-eight per cent thereof. On demurrer to the complaint, *held*, that the facts alleged did not effect such an increase of the capital stock of the B. E. L. Co. as entitled plaintiff to the specified percentage thereof; and so, that the demurrer was properly sustained.

Reported below, 77 Hun, 149.

(Argued April 23, 1895; decided April 30, 1895.)

**APPEAL** from an interlocutory judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 27, 1894, which reversed an order of Special Term sustaining a demurrer to the complaint.

On defendants' demurrer to the complaint.

This action is to compel the defendant, the Rochester Gas and Electric Company, to issue to the plaintiff four hundred and eighty thousand dollars, par value, of its paid-up stock; or, in default thereof, that the defendants be required to pay to him the par value thereof.

The plaintiff's assignor, Rowley, became the owner through a contract with the Brush Electric Company, of Cleveland, O., of the exclusive right to sell dynamo electric machines and apparatus made under the Brush patent for electric lighting and electroplating. Rowley agreed with certain persons in the city of Rochester respecting the organization of a stock company, with a capital of one hundred thousand dollars, for the purpose of introducing the Brush electric light into that city. By the agreement forty-eight per cent of the capital stock of the company was to be paid over to Rowley, as a consideration for an assignment by him of his rights under the Cleveland contract, and, also, forty-eight

per cent of any increase of the capital of said company. After the formation of the Rochester company, under the name of the Brush Electric Light Company of Rochester, New York, one of the defendants in this action, a formal agreement was executed between that company and Rowley ; through which Rowley assigned to it his rights under the Brush patent for Monroe county. The contract contained this agreement on the part of the company (after having recited the issue and delivery to him of forty-eight thousand dollars of paid-up capital stock as a consideration for the assignment), viz : "That if at any time hereafter the said capital stock of the said party of the second part shall be increased (otherwise than for stock issued for cash paid therefor at the time of such issue at par to the extent of one hundred thousand dollars [\$100,000] in addition to the present capital) forty-eight per centum of the par value of such increase shall be issued and delivered to said party of the first part, or his assigns, full paid up. \* \* \* And the said party of the second part for itself, successors and assigns, covenants, promises and agrees to and with said party of the first part, his successors and assigns, that in case at any time hereafter the capital stock of said party of the second part shall be increased (otherwise than for cash paid for the said increase at the time at par to the extent of one hundred thousand dollars [\$100,000] in addition to the present capital), that then and in that case said party of the second part will issue and deliver to the said party of the first part, his successors or assigns, forty-eight per centum, in amount, of the par value fully paid up, of such increase as a part of the consideration for this assignment. \* \* \* It is expressly agreed between the parties hereto that the party of the second part shall not sell or dispose of any of its interests, franchises or rights under this contract without the consent of the party of the first part, or his assigns, in writing. This agreement shall not, however, prevent any stockholder from disposing of his stock if he elect so to do." It was subsequent to the making of this latter agreement, that the

plaintiff became possessed, by assignment, of Rowley's interest and rights under the various agreements. Subsequently, with the plaintiff's consent, there was an increase of its capital stock to the extent of one hundred and fifty thousand dollars in cash, in addition to the one hundred thousand dollars stated in the contract between the company and Rowley; thus making the whole capital stock of the company two hundred and fifty thousand dollars. Some years later a consolidation was proposed between the Brush Company and two other electric light companies in that city and the Rochester Gas Company. This project of consolidation, however, was abandoned, because of the inability to secure the plaintiff's waiver of his right to forty-eight per cent of an increase in the stock of the Brush Company of Rochester under his contract; such increase being desired in the capital stock of all the four companies upon consolidation. Thereupon, the Rochester Gas Company and the two other electric light companies of Rochester consolidated into a single corporation, called the Rochester Gas and Electric Company, the present defendant, with a capital stock divided into forty-three thousand shares of one hundred dollars each. Of this stock a certain amount was apportioned to the stockholders of each of the consolidating companies and there were retained in the treasury of the consolidated company twelve thousand five hundred shares, which the directors were authorized to issue in the purchase of not less than a two-thirds interest in the capital stock of the Brush Company, at the rate of five shares of the stock of the consolidated company for one share of the Brush Company. In pursuance of this plan the new company acquired all of the Brush Company's stock in exchange for the twelve thousand five hundred shares at the rate mentioned. The Rochester Gas and Electric Company, in this way, acquired the control of the Brush Company and the practical ownership of all its properties; but the corporate organization of the Brush Company has been kept up, with a board of directors and with officers, although the persons constitut-

ing the board of directors are also directors of the consolidated corporation.

These facts appear in the complaint of the plaintiff, and his claim is that, to all intents and purposes, the Rochester Gas and Electric Company is the Brush Company, and that, through the process by which the shares of the stock of the Brush Company were acquired by the Rochester Gas and Electric Company, the capital stock of the former company was virtually increased by just one million of dollars, and that the directors and stockholders of the Brush Company have, by indirect means, effected an increase of the capital stock of the company with the view of preventing his assertion of a claim under his contract to receive forty-eight per centum of any increase of the capital stock.

A demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, was overruled at the Special Term and judgment ordered thereon for the plaintiff. Upon appeal by the defendants to the General Term, that court reversed the judgment of the Special Term; but gave leave to the plaintiff to appeal to this court from the interlocutory judgment of reversal.

*George F. Dunforth* for appellant. The facts stated in the complaint are admitted by the demurrer, and the question for the court to determine is, whether upon them the plaintiff is entitled to any relief. (*Marie v. Garrison*, 83 N. Y. 14-23; *Wetmore v. Porter*, 92 id. 76; *Milliken v. W. U. Tel. Co.*, 110 id. 403.) Even a statute cannot be used as an instrument of fraud. (*Riggs v. Palmer*, 115 N. Y. 506.) The transaction cannot be sustained as coming within the statute permitting one corporation to purchase stock of another corporation. (Stock Corporation Law, Laws of 1892, § 40; *Brand v. Jessup*, 106 U. S. 478; *Booth v. Bunce*, 33 N. Y. 139.) In asking relief the plaintiff invokes the familiar principle on which courts of equity proceed — that whosoever is found in possession of a trust fund under circumstances which charge him with knowledge of the trust is bound in respect to that

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special property to the execution of the trust and to account as trustee to whoever is beneficially interested in such fund. (*Adair v. Shaw*, 1 Sch. & Lef. 243, 262; *In re Howe*, 1 Paige, 214; *Cook v. Tullis*, 18 Wall. 332-341; *Taylor v. Plumer*, 3 M. & S. 562; Story's Eq. Juris. 1258; *Newton v. Porter*, 69 N. Y. 133.) The Brush Company, by the contract of assignment and the possession of property in which the plaintiff had an interest, took it to that extent in trust, and the relation of those parties was that of trustee and *cestui que trust*. (*Brewster v. Hatch*, 122 N. Y. 349; *Barnes v. Brown*, 85 id. 527; *Mahoney v. Boyle*, 141 id. 462; *Milliken v. W. U. T. Co.*, 110 id. 407; *Morris v. Whither*, 20 N. Y. 41; *Smith v. Holbrook*, 82 id. 562; *Murdock v. Gilchrist*, 52 id. 252.) The fiction that a corporation is a legal entity, distinct from the persons who compose it, can never be resorted to when it enables persons composing the corporation to work an injury to any one or perpetrate a fraud upon anybody. (*D. M. G. Co. v. West*, 50 Iowa, 16-25; Morawetz on Corp. § 818; *Booth v. Bunce*, 33 N. Y. 139-156; 3 M. & C. 773; *U. S. v. Danbridge*, 12 Wheat. 69; *Holmes v. Gilman*, 138 N. Y. 369; *Disbrow v. Harris*, 122 id. 366.) Part only of the purchase price of the rights and privileges was paid to the plaintiff, and he may now enforce his equitable lien for the residue against the legal interests which the defendants have acquired under the new corporation. (*Phyfe v. Wardell*, 5 Paige, 268; *Stanley v. C. & B. R. Co.*, 3 M. & C. 782.)

*Edward Harris* for respondent. Only the material allegations of fact set forth in the complaint are admitted by the demurrers. (*Bonnell v. Griswold*, 86 N. Y. 294; *Bogardus v. N. Y. L. Ins. Co.*, 101 id. 328; *Masterson v. Townshend*, 123 id. 458.) There has been no increase in the capital stock of the Brush Electric Light Company of Rochester, N. Y. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *S. M. D. Co. v. Ropes*, 6 Pick. 23; *Smith v. Goldsworthy*, L. R. [4 Q. B.] 430; *R. Co. v. Allerton*, 85 U. S. 233.) The complaint states no cause of action against the Rochester Gas and Electric

Company. (Laws of 1892, chap. 691, §§ 8-10 ; Laws of 1890, chap. 567.) The Brush Company has not been merged with the consolidated company. (*Barnes v. Brown*, 80 N. Y. 527.) Neither of the defendants is responsible for the intent of the officers, directors and managers of the consolidating companies and of the Brush Company. (Morawetz on Corp. 234, 341.)

*Per Curiam.* In the view that we take of this case, it is unnecessary to consider the appellant's argument as to the rights gained through his contract with the Brush Company, otherwise than with respect to the question of whether there has been an increase of the capital stock of that company. Assuming all that he claims, in regard to his absolute right under the contract to receive forty-eight per cent, of any increase of the capital stock, we do not think it can be said that there has been any such increase effected through the transactions referred to. It may be perfectly true that the transaction with the Rochester Gas and Electric Company, by which that company acquired all of the stock of the Brush Company, at the rate of five shares of the former for one of the latter, was a device, adopted by the officers and stockholders of the latter company, to accomplish by indirect means what could not be done directly, because of their inability to secure the appellant's consent, or to agree upon terms with him. But it was a possible transaction and one which the contract did not contemplate or provide for. The language of the contract is explicit with respect to what the company agreed to do and that is "that in case at any time hereafter the capital stock \* \* \* shall be increased \* \* \* that then in that case said party of the second part (the company) will issue and deliver to the said party of the first part (Einstein's assignor) \* \* \* forty-eight per cent \* \* \* of such increase." No condition of things will meet that provision, unless there be, in fact, as in law, an increase of the capital stock. Now the capital stock of the Brush Company, which was \$250,000, is to-day \$250,000 and

it is only by regarding the holdings by the former stockholders of the Brush Company of the shares of capital stock of another company, to wit: The Rochester Gas and Electric Company, that it can be supposed that the capital of the company is larger, as the result of the transactions complained of, than it was before. But that notion is quite untenable. There is but one way by which the capital stock of a company can be increased and that is in the manner authorized by its charter, or by some express authorization of the legislature of the state. No acts of the officers or agents of the company are competent to enlarge the capital stock; nor can the stockholders do so, save in the particular manner pointed out by the statute. There is no such thing as an implied authority to increase or diminish the capital stock of a company. The transaction in this case was simply one whereby all the stockholders of the Brush Company have parted with their stock to the Rochester Gas and Electric Company, upon certain terms which had been recommended by the directors. The appellant's agreement forbade the company from selling any of its interests or rights without his written consent; but it expressly recognized and preserved the right of any stockholder to dispose of his stock if he so elected. The Rochester Gas and Electric Company had the right to purchase, and the consequence was that it became a stockholder in the Brush Company in the place of those who, by transfers of their stock, had ceased to be stockholders therein. But that has no effect upon the Brush Company's stock, except to change the ownership; and that the Brush Company is to-day a distinct and existing organization, with its own officers and board of directors, and with a capital stock of \$250,000, is an indisputable fact and is conceded. The argument of the appellant, that the proceedings through which the Rochester Gas and Electric Company was formed, and through which it subsequently acquired all of the stock of the Brush Company, "transmuted the stockholders of the Brush Company into stockholders of the Rochester Gas and Electric Company," may be perfectly true; but the stock of the Brush

Company never changed in form or amount. All that took place was a change of its ownership.

If it is true, as alleged in the complaint, that the Rochester Gas and Electric Company has "completely absorbed" the Brush Company and is infringing upon any of its rights, by the use of the patents which were assigned to it; or if it is, in other legally appreciable ways, violating any of its corporate rights, then the appellant, if his contract with the company gives him such an interest in the corporation and such a standing in court as to enable him to assert his rights, or the rights of his company, is not precluded from seeking relief in a proper action. Whether his having ceased to be a stockholder (and he disclaims here any right of action in that character) affects his capacity to bring such an action, in assertion of the corporate rights of the Brush Electric Company, is a serious question about which grave doubts may be entertained, but which we are not called upon now, and which we do not undertake, to decide. The appellant's action must fail, if there has not been that increase of capital stock which his contract contemplated and provided for and, as we think that no such change was effected by the transactions set forth in the complaint, it follows that the judgment of the General Term, which reversed the interlocutory judgment overruling the demurrer of the defendants to the complaint, was correct and should be affirmed, with costs to the respondent; but with leave to the plaintiff to amend his complaint within twenty days after service upon his attorneys of a copy of the order entered upon our remittitur.

All concur, except BARTLETT, J., not voting, and HAIGHT, J., not sitting.

Judgment accordingly.



MERRITT A. JONES, Respondent, v. CHARLES H. BUTLER,  
Appellant.

In an action against a stockholder of a limited liability corporation, organized under the Business Corporation Act of 1875 (Chap. 611, Laws of 1875), to enforce the liability imposed by the provision of said act (§ 37) declaring that the stockholders of such corporation shall be individually liable for its debts until the whole amount of its capital stock has been paid in and a certificate thereof has been recorded "in the office of the secretary of state and of the county in which the principal business office of such corporation is situated," the answer set forth, in substance, that within the time prescribed by law, and more than four years before the commencement of the action, the entire capital stock was paid in, and a certificate setting forth that fact was filed with the secretary of state. (A demurrer to this portion of the answer, *held*, that as the statute was defective in its specification of the county office where the certificate was to be recorded, the fact that it was not recorded in the county clerk's office did not, under the circumstances, impose the liability; that there was a substantial compliance with the provision of the statute; and so, that the demurrer was properly overruled.

(Argued April 22, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 11, 1894, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term sustaining a demurrer to parts of defendant's answer.

The facts, so far as material, are stated in the opinion.

*George C. Holt* for appellant. The repeal of the Business Act of 1875, and of all provisions of law requiring a certificate of the payment of capital stock to be filed in any public office by the acts of 1892, amending the General Corporation Act and the Stock Corporation Act, bar this action. (Laws of 1875, chap. 611; Laws of 1892, chap. 688, § 34; *Butler v. Palmer*, 1 Hill, 324; *People v. Livingston*, 6 Wend. 526; *Knox v. Baldwin*, 80 N. Y. 610; *Coffin v. Rich*, 45 Maine, 507; Suth. on. Stat. Const. § 163; *People v. Suprs.*, 67 N.

Y. 109; *Comm. v. Beatty*, 1 Watts, 382; *Hampton v. Comm.*, 19 Penn. St. 329; *Hirschfeld v. Bopp*, 145 N. Y. 84.) The Business Act of 1875 did not require a certificate of payment of capital stock to be recorded in the county clerk's office. (Laws of 1875, chap. 611, § 37; *Chase v. Lord*, 77 N. Y. 1.) The omission to file a certificate of payment in one of two public offices, through clerical inadvertence, did not make the defendant liable. (*Veeder v. Mudgett*, 95 N. Y. 295; *Whitney v. Cammann*, 137 id. 342.) The fact that no action was brought upon the debts sued on within two years after the debts became due bar the action. (*Shellington v. Howland*, 53 N. Y. 371; *Kincaid v. Dwinelle*, 59 id. 548; *Hardman v. Sage*, 124 id. 25; *Hunting v. Blun*, 143 id. 511; *Hirschfeld v. Bopp*, 145 id. 84.)

*Henry L. Brant* for respondent. This action is not barred, nor are the rights of the plaintiff, or the liability of the defendant therein, affected by the Corporation Laws of 1890 and 1892. (Laws of 1890, chap. 564, § 70; Id. chap. 567, § 21; Laws of 1892, chap. 687, §§ 34, 71, 22, 35; *N. T. W. Co. v. Gilfillan*, 124 N. Y. 302, 307; *Buckley v. Whitcomb*, 121 id. 107, 109; *Cochran v. Wiechirs*, 119 id. 399, 402; *Wiles v. Suydam*, 64 id. 173; *Lowry v. Inman*, 46 id. 118; *Flash v. Conn.*, 109 U. S. 371; *Corning v. McCullough*, 1 N. Y. 47; *Story v. Furman*, 25 id. 214.) The Business Act of 1875, section 37, required a certificate of the payment of capital stock to be recorded in the office of the clerk of the county in which the principal business office of the corporation was situated. (*Jones v. M. & E. P. Co.*, 80 Hun, 368; *People v. Hoffman*, 97 Ill. 234; *State v. Brandt*, 41 Iowa, 593; *Haney v. State*, 34 Ark. 263; *Ex parte Hedley*, 31 Cal. 108; *Rolland v. Comm.*, 82 Penn. St. 306, 326; *People v. Potter*, 47 N. Y. 375, 379; *Bell v. Mayor, etc.*, 105 id. 139, 144; *Wuesthoff v. G. L. Ins. Co.*, 107 id. 580, 590; *Delafield v. Brady*, 108 id. 524, 529; *People v. Angle*, 109 id. 564, 568.) Clerical inadvertence is no excuse for a failure to comply with a requirement of statute. (*Hardman v. Sage*, 124 N.

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Y. 25; *Brown v. Smith*, 13 Hun, 408; 80 N. Y. 650; *Whitney v. Cammann*, 137 id. 342; *Buckley v. Whitcomb*, 121 id. 107.) The fact that no action was brought upon the debts sued on within two years after the debts became due, does not bar this action. (Laws of 1875, chap. 611, § 2; *Shellington v. Howland*, 53 N. Y. 371, 374; *Kincaid v. Dwinelle*, 59 id. 548; *Hardman v. Sage*, 124 id. 25; *Hunting v. Blun*, 143 id. 511; *Hirschfeld v. Bopp*, 145 id. 8; *Knox v. Baldwin*, 80 id. 610.)

BARTLETT, J. The legal questions presented in this case arise on demurrers interposed by the plaintiff to parts of the defendant's answer for insufficiency.

The demurrers have been sustained below and the defendant appeals to this court upon the certificate of the General Term.

The defendant is sued as a stockholder of the New York Advertising Agency, Limited, a corporation organized under the Business Act of 1875, to recover debts due plaintiff for services rendered on the ground that a certificate of the full payment of the capital stock was not filed in the clerk's office of the city and county of New York.

Two demurrers were interposed, one to the eighth paragraph and the other to the tenth paragraph of the answer.

The eighth paragraph alleges, in substance, that the capital stock of said corporation was, in fact, fully paid in; that the certificate of payment required by the statute was executed and filed in the secretary of state's office at Albany; denies any knowledge whether said certificate was not filed in the New York county clerk's office, but alleges that if not it was owing to clerical inadvertence, and that it has since been duly filed in that office.

The tenth paragraph alleges, in substance, that no action on the debt alleged in the complaint was brought against the corporation, or this defendant, or any person within two years after it became due.

It was admitted on the argument, under the decisions of this court, that the corporation had been dissolved during the two years after the debts became due and that a preliminary suit against the corporation was not necessary. (*Shellington v. Howland*, 53 N. Y. 371; *Kincaid v. Dwinelle*, 59 id. 548; *Hardman v. Sage*, 124 id. 25; *Hunting v. Blun*, 143 id. 511; *Hirshfeld v. Bopp*, 145 id. 84.)

In the view we take of this case it is unnecessary to examine many of the questions raised by the briefs and argued by counsel.

The plaintiff's claim rests on the following facts, viz. :

The Business Act of 1875 (Laws of 1875, ch. 611) prescribes in section 37 the liability of stockholders. The material portions of that section are as follows :

"In limited liability companies all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in and a certificate thereof has been made and recorded as hereinafter prescribed. \* \* \* The directors of every such company, within thirty days after the payment of the last installment of the capital stock, shall make a certificate stating the amount of the capital so paid in, which certificate shall be signed and sworn to by the president and a majority of the directors; and they shall, within the said thirty days, record the same in the office of the secretary of state, and of the county in which the principal business office of such corporation is situated."

It will be observed that this section, read literally, requires the certificate to be filed in the office of the secretary of state, and, also, either in the office of the county or of the secretary of the county.

The New York Advertising Agency, Limited, was organized as a corporation May 3d, 1887; its entire capital stock was paid in December 31st, 1888, within the period provided

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by law ; a certificate setting forth that fact was filed in the office of the secretary of state January 18th, 1889, also within the period provided by law.

This action was not begun until July, 1893, and it is admitted that the certificate of payment of stock was not filed in the clerk's office of the city and county of New York until after that time.

This case will be considered as if this last filing of the certificate had been omitted.

The plaintiff seeks to recover of the defendant a debt due from the corporation, notwithstanding the fact that four years and a half before he commenced his action the entire capital stock of the company had actually been paid in and a certificate announcing that fact filed in the office of the secretary of state, he insisting that it was the defendant's duty to have construed the defective provisions of the statute, already adverted to, as requiring a certificate of paid-up stock to be filed in the office of the clerk of the city and county of New York.

It is upon this single, technical point the plaintiff rests his right to recover.

The object of the statute was to protect persons giving credit to the corporation by requiring its capital to be paid in promptly and the fact announced to the world by a certificate filed in a public office.

In the case at bar it must be presumed that the plaintiff was aware of the defective section, which was supposed to protect his rights as a creditor of the corporation. It was, therefore, his plain duty, if he wished to ascertain the fact as to payment of capital, to have searched in the office of the secretary of state as the office of the county clerk was not designated by the statute in express terms ; he would then have ascertained that the capital had been paid in and that the officers of the corporation had substantially complied with the law as it stood.

We do not intend to relax the rule which requires a corporation to comply strictly with the letter and spirit of the

statute absolving its stockholders from the common-law liability of partners, but we do hold in the case at bar that it would be a gross injustice to require this defendant to pay the debt of a corporation which had substantially complied with the provisions of a defective statute simply because he did not construe a sentence wherein the legislature had failed to express itself intelligibly.

To permit such a recovery would be to make shadow substance and allow technicality to work injustice.

The judgments of the General and Special Terms are reversed and the demurrers overruled with one bill of costs.

All concur.

Judgment accordingly.

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THE PEOPLE ex rel. EDSON LEWIS, Appellant, v. EDWARD F. BRUSH et al., Respondents.

A writ of mandamus will not be granted upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office.

*It seems*, that the appropriate remedy in such case is by quo warranto.

Where, on motion for a peremptory writ of mandamus, opposing affidavits are read which are in conflict with the averments of the moving affidavits, the question as to the right to the writ must be determined upon the assumption that the averments in the opposing affidavits are true.

An application for a peremptory writ of mandamus requiring defendant B. to surrender to relator the office of mayor of the city of Mt. V., and that the other defendants, composing the common council, recognize him as mayor, was made upon the relator's affidavit, which alleged, in substance, that at the election held in 1894, he received a majority of the votes lawfully cast for mayor, and that on the next day at a regular meeting of the common council the votes were duly canvassed and he was declared elected; also, upon the certificate of the city clerk, that a resolution to that effect was adopted by the common council, and the affidavit of B. to the effect that he conceded the relator was duly elected, and that there was a valid canvass. An affidavit of one of the defendants was read in opposition, which denied that the relator received a plurality of all the votes, or that it so appeared from the lawful certificates of the

inspectors of election on file in the office of the city clerk, or that there was a regular meeting of the common council at which there was a canvass of the votes for mayor. *Held*, that the application was properly denied; that a serious question was raised by the opposing affidavit, as to the relator's title to the office; and so, that a mandamus was not his proper remedy.

(Argued April 22, 1895; decided April 30, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 12, 1894, which affirmed an order of Special Term denying a motion by the relator for a writ of peremptory mandamus.

The facts, so far as material, are stated in the opinion.

*Roger M. Sherman* for appellant. The discretion which the court has to grant or refuse the writ of mandamus is a legal, not an arbitrary discretion, and its exercise is reviewable in the Court of Appeals. (*People ex rel. v. Common Council*, 78 N. Y. 56; *Gilroy v. Smith*, 23 N. Y. S. R. 5.) This appeal is properly heard as a motion. (*People v. Jeroloman*, 139 N. Y. 16, 17.) The use of the writ to compel recognition of a public officer whose title is clear and is conceded by the officer *de facto*, and whose functions require others to act with him, is approved. (*People v. Kilduff*, 15 Ill. 493; *People ex rel. v. Sheffield*, 47 Hun, 482; *Rex v. Whitwell*, 5 Term R. 85, 86.)

*Joseph S. Wood* for respondents. In insisting on the issuance of a peremptory writ of mandamus, the relator admits that the denials are true; and if the denials are true, he is not entitled to the peremptory writ. Even if the statements were true, the motion for a peremptory writ could not be granted, because an issue of fact is raised. (*People ex rel. v. Fairman*, 12 Abb. (N. C.) 252; *People ex rel. v. Cromwell*, 102 N. Y. 477; *People ex rel. v. Bd. of App.*, 64 id. 627; *People ex rel. v. Bd. Suprs.*, 98 id. 230; *People v. Richards*, 99 id. 620.) The issuance of a peremptory writ of mandamus lies wholly in the discretion of the court, and an

order denying the same is not appealable to this court unless it is shown on the moving papers and counter affidavits that the relator has a clear and undisputed right and has no other adequate remedy. (*Clark v. Miller*, 54 N. Y. 528.)

HAIGHT, J. The relator asked for a peremptory writ of mandamus, based upon his own affidavit, stating that he received a plurality of the votes lawfully cast for the office of mayor, at the election held in the city of Mount Vernon, May 15, 1894; and that on the following day, at a regular meeting of the common council, the votes were duly canvassed and he declared elected. He also presented a certificate of the city clerk that a resolution was adopted to that effect, together with the affidavit of Edward F. Brush, one of the respondents and the then acting mayor, to the effect that he conceded that the relator was elected to the office of mayor, and that there was a valid and lawful canvass of the certificates of his election. In opposition to the motion an affidavit of Edwin W. Fiske, one of the respondents and an alderman of the city, was read, in which he denies that the relator received a plurality of all of the votes cast for the office of mayor, or that it so appeared from the lawful certificates of the inspectors of election on file in the office of the clerk of the city, or that there was a regular meeting of the common council of the city held on the day following the election at which there was a canvass of the votes or of the certificates of election so far as the office of mayor was concerned.

The Special Term denied the motion. In the opinion delivered by the court on the denial thereof it appears that the common council of the city was composed of ten aldermen, and that but five were present at the time the votes were canvassed, and the conclusion was reached that the canvass was illegal and void for the reason that no quorum was present.

We have carefully examined the record and have failed to find any statement, either in the moving or opposing affidavits, showing the number of aldermen that were present taking part in the canvass, and it is well settled that we cannot refer



to the opinion of the court below for the purpose of ascertaining the facts. This appeal must, therefore, be disposed of upon the other questions presented. Mechem, in his work upon Public Offices and Officers, at section 478, says: "The proceeding by quo warranto is the proper and appropriate remedy for trying and determining the title to a public office and of ascertaining who is entitled to hold it; of obtaining possession of an office to which one has been legally elected and has become duly qualified to hold, and also of removing an incumbent who has usurped it, or who claims it by an invalid election, or who illegally continues to hold it after the expiration of his term."

*In the Matter of the Application of Gardner for a Mandamus to the Clerk of the Board of Supervisors of Kings County* (68 N. Y. 467) it was held that a writ of mandamus upon the application of one claiming title to an office will not be granted for the purpose of determining the validity of his claim where there is a *serious question* in regard thereto and another person is holding and exercising the functions of the office. And in *The People ex rel. Dolan v. Lane* (55 N. Y. 217) it is stated in the opinion of the court that "If there be a *serious question* as to the title to the office, it ought not to be decided against the party in possession in a proceeding in which he has no opportunity to be heard. Mandamus is not the proper remedy in such a case." (See, also, *People ex rel. Wren v. Goetting*, 133 N. Y. 569.)

Upon a motion for a peremptory writ of mandamus where opposing affidavits are heard which are in conflict with the averments in the moving affidavit, the question as to the right to the writ must be determined upon the assumption that the averments in the opposing affidavits are true. (*People ex rel. Tenth National Bank v. The Board of Apportionment of the City and County of New York*, 64 N. Y. 627.) Here we have a denial of the essential facts upon which the application for the writ was based. The facts relied upon by the relator were, therefore, controverted and a serious question raised in reference to his title to the office. We are,

therefore, of the opinion that mandamus was not his proper remedy, but that he should have resorted to an action under the Code in the nature of a quo warranto.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

146	64
162	504
162	507

146	64
d170	552
d170	553

NATIONAL BOARD OF MARINE UNDERWRITERS, Appellant,  
v. NATIONAL BANK OF THE REPUBLIC of New York,  
Respondent.

Plaintiff having recovered a judgment against defendant on the report of a referee for less than the damages demanded in the complaint appealed from so much thereof as awarded damages. Defendant appealed from the whole judgment. The General Term affirmed "the judgment from which plaintiff appeals," and reversed "the judgment from which the defendant appeals," and ordered a new trial, unless plaintiff stipulated to reduce the recovery as specified. Plaintiff failed to stipulate and judgment was entered in accordance with the order. *Held*, that the General Term had no authority to make the order; that if there was error in the judgment on the referee's report, this necessarily required the reversal of the entire judgment and a new trial as to the entire claim or a modification of the judgment.

*Nat. Bd. of Marine Underwriters v. Nat. Bank* (9 Misc. Rep. 688), reversed.

(Argued April 24, 1895; decided May 3, 1895.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 18, 1894, which affirmed on plaintiff's appeal a judgment in favor of plaintiff entered upon the report of a referee, and reversed said judgment on defendant's appeal and ordered a new trial unless plaintiff stipulate to reduce its recovery.

Appeal also from an order of said General Term, made October 16, 1894, which denied a motion to vacate said order and the judgment entered thereon.

The facts, so far as material, are stated in the opinion.

*George A. Black* for appellant. The defendant's contention that there was an account stated and that this is a good

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defense is erroneous. (*Stenton v. Jerome*, 54 N. Y. 480; *Lockwood v. Thorne*, 11 id. 170; *Quincey v. White*, 63 id. 377; *Welch v. G. A. Bank*, 73 id. 424; *Frank v. C. Bank*, 84 id. 213; *Schmidt v. Blood*, 9 Wend. 268; *Vanderbilt v. R. T. Co.*, 2 N. Y. 479; *Shipman v. Bank*, 126 id. 331; *Morgan v. Bank*, 11 id. 434.) A bank called upon to pay a check of a depositor to the order of a payee named, has a double duty cast upon it. (*Weisser v. Dennison*, 10 N. Y. 77; *Frank v. C. Bank*, 84 id. 213.) A depositor owes no duty to a bank requiring him to examine his pass book or returned checks with a view to the detection of forgeries in the indorsements. (*Shipman v. Bank*, 126 N. Y. 328; *Bank of B. N. A. v. M. N. Bank*, 91 id. 106; *Thomson v. Bank of B. N. A.*, Id. 106.) The finding of the referee that there was no proof that the checks were drawn to the order of specified persons was erroneous. (*Frank v. C. Bank*, 84 N. Y. 211; *Stimson v. Brown*, 68 id. 358; *U. S. v. Pugh*, 99 U. S. 265; *The E. J. Morrison*, 153 id. 199; *Goodsell v. W. U. T. Co.*, 109 id. 149.)

*George S. Hastings* for respondent. The court will presume that the judgment of the court below reversing the judgment entered upon the report of the referee was upon a question of law only, as, indeed, was the case. (Code Civ. Pro. § 138.) The judgment, therefore, cannot be reversed upon any question of fact; nor will the court look beyond the order of reversal. (*Tassell v. Wood*, 76 N. Y. 614; *Snebley v. Connor*, 78 id. 218; *Sheldon v. Sheldon*, 51 id. 354; *Reynolds v. Robinson*, 82 id. 106; *Crim v. Starkweather*, 136 id. 635.) The plaintiff cannot recover as to any of the questioned checks (exclusive of the Butler Stillman check), for the reason that it has wholly failed to prove that the payments made by the defendant, and charged to the account of the plaintiff, were in any respect irregular or unauthorized payments. (*Cole v. G. F. Ins. Co.*, 99 N. Y. 42; *Wylde v. N. R. R. Co.*, 53 id. 156; *Weisser v. Denison*, 10 id. 81; *U. S. v. Hayward*, 2 Gallison, 499; *G. W. R. R. Co. v.*

*Bacon*, 30 Ill. 353; *S. M. Ins. Co. v. Kearney*, 16 Q. B. 295; *Rex v. Burdett*, 4 B. & A. 95; *King v. Turner*, S., M. & S. 206; *State v. Crowell*, 26 Maine, 171; *State v. Lipscombe*, 52 Mo. 32; *State v. Whitehead*, 21 Maine, 341.) The defendant should not be charged with the payment of the check for \$1,192.03 made payable to the order of a fictitious person, namely Butler Stillman. (126 N. Y. 325; *Coggill v. A. E. Bank*, 1 id. 113; *Phillips v. M. N. Bank*, 140 id. 556; *Daniels on Neg. Inst.* § 140; *Pleto v. Johnson*, 3 Hill, 112; *N. Y. & H. R. R. Co. v. Schuyler*, 34 N. Y. 30.)

GRAY, J. The plaintiff recovered a judgment against the defendant, upon the report of a referee, which awarded to it less than the damages demanded in the complaint. It appealed from so much of that judgment as awarded the damages. The defendant also appealed from the whole judgment. The General Term made the following order: "That the judgment from which the plaintiff appeals be \* \* \* affirmed with costs and it is further ordered that the judgment from which the defendant appeals be \* \* \* in all respects reversed and a new trial ordered with costs to the defendant to abide the event unless the plaintiff shall file a stipulation \* \* \* agreeing to reduce the recovery," etc. Judgment was entered upon that order in accordance with its terms; fixing the sum of plaintiff's costs and, because of the plaintiff's failure to stipulate to reduce its recovery, as suggested in the order, absolutely reversing the judgment upon the defendant's appeal and ordering a new trial, with costs to abide the event, etc. Subsequently, the plaintiff moved the court, at General Term to vacate its order and to enter "the proper order \* \* \* in conformity with the decision," etc. The motion was denied. The plaintiff then appealed to this court from so much of the judgment entered, etc., as affirmed the judgment entered upon the report of the referee and, also, appealed from the order of the General Term denying the motion to vacate its order.

We think there was no authority for such an order by the

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General Term, or for the judgment entered thereupon and that the plaintiff's motion to vacate them should have been granted. Their provisions are glaringly inconsistent. First, the judgment upon plaintiff's appeal is affirmed and then it is reversed in all respects; costs being given to each party by the judgment. The plaintiff's recovery of damages is affirmed; but it is also reversed. Such a practice cannot be approved, for it would lead to the utmost confusion and permit what has been condemned in this court; namely, that one portion of the cause could be sent back for a new trial and that the other portion might be brought here. (*Story v. N. Y. & H. R. R. Co.*, 6 N. Y. 85; *Goodsell v. W. U. Tel. Co.*, 109 id. 147.) If the judgment must be reversed for error, the error necessarily reverses the entire judgment and the new trial must be as to the entire claim. (*Wolstenholme v. Wolstenholme Co.*, 64 N. Y. 272.) The anomalous condition is presented where a judgment decisive of an action to recover damages is at once affirmed and reversed, without other distinctive elements in the order of the appellate court than those of separate appeals by the plaintiff and defendant. It is scarcely conceivable that such a decision can stand and the logical result, whether we regard the order or look at the reasons assigned in the opinion, is that a reversal of the judgment is effected. The separate appeals by the plaintiff and the defendant call for but one of the dispositions authorized by the Code to be made by the General Term and, as that court found error in the referee's conclusions, they should either have simply ordered the reversal of the judgment and a new trial of the issues; or do what was probably in mind (and what, because, in our judgment, the conclusion reached by the General Term was correct, would have been proper), modified the judgment to the extent mentioned in the opinion. Not having done so, the order of the General Term should be reversed and an order should be entered reversing the judgment entered upon the report of the referee absolutely and ordering a new trial before another referee, with costs to abide the event.

As to the plaintiff's appeal from the judgment, we think that, in view of the plaintiff's attitude towards the order of the General Term, it should not have been taken and must fail. It was open to the plaintiff to take a new trial of the cause upon the General Term order if it desired it; but, with an absolute reversal of the judgment and a new trial ordered, it could only come here upon appeal upon a stipulation for judgment absolute in case of affirmance. Our determination upon the plaintiff's appeal from the order of the General Term denying the motion to vacate its judgment, necessarily, leads to the dismissal of its appeal from the judgment.

The appeal from the judgment is, therefore, dismissed, but, under the circumstances, without costs to either party as against the other. The order of the General Term, which disposed of the appeals of the parties, is reversed and an order should be entered reversing the judgment, entered upon the report of the referee, and ordering a new trial, with costs to abide the event.

Costs as upon an appeal from an order are awarded to the appellant.

All concur.

Ordered accordingly.

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In the Matter of the Application of WILLIAM H. SMITH et al.  
for a Writ of Habeas Corpus, etc.

Where a right to restrain the citizen in his personal liberty, or to interfere with his pursuit of a lawful avocation is claimed, to sustain the claim it must appear very clearly not only that the right has been conferred by law, but that the facts exist justifying its exercise.

Under the provision of the charter of the city of Brooklyn (§ 5, tit. 12, chap. 588, Laws of 1888) making it the duty of the health commissioner of that city to take such measures for the preservation of the public health from impending pestilence, and under the provision of the "Public Health Law" (§ 14, chap. 661, Laws of 1893) requiring every local board of health to "guard against the introduction of contagious and infectious diseases," and to "require the isolation of all persons \* \* \* infected with and exposed to such disease," to justify such isolation

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the fact must exist that the persons are infected with the contagious disease or have been exposed to it.

No authority is given by said provisions to said health commissioner to quarantine any person simply because he refuses to be vaccinated, and to continue him in quarantine until he consents to such vaccination.

On application for a writ of habeas corpus, the relators' petition alleged that they were imprisoned and restrained of their liberty at their house in said city by the order and direction of the commissioner of health; that they had been exposed to no contagion, and were not afflicted with any contagious disease. In the return made by the commissioner to the writ, he alleged that for several months smallpox had been epidemic in the city; that as he was informed and believes, before ordering the relators to be detained in quarantine, they were engaged in the prosecution of the express delivery business in said city, and in its worst infected district: that the business includes the carrying of household furniture and other articles which may come from infected centres and be infected with the germs of smallpox; that the relators "were unusually exposed to such contagion," and it was "of special importance that they should be vaccinated at once," and that they were detained in quarantine because of their refusal to be vaccinated. *Held*, that a demurrer to the return was properly sustained; that said commissioner had no jurisdiction to make the order.

(Argued April 22, 1895; decided May 3, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 14, 1895, which reversed an order of Special Term made in habeas corpus proceedings discharging the appellants from the custody of Z. Taylor Emery, health commissioner of the city of Brooklyn.

The relators alleged in their petition that they were imprisoned, or restrained of their liberty, at their house in the city of Brooklyn, not by virtue of any judgment or process issuing from any court, but upon the order and direction of the respondent, the commissioner of health of the city of Brooklyn. They alleged as the cause for their imprisonment, which was effected by a detail of policemen to watch the premises, that they had refused to permit themselves to be vaccinated. They also alleged that they had been exposed to no contagion and were not afflicted with any disease, contagious or otherwise. In the return made by the commissioner

of health to the writ of habeas corpus issuing upon the the relators' petition, it is stated that the relators were placed under quarantine by his orders and by virtue of the authority vested by law in him to take such precautions as are necessary for the protection of the public health against smallpox; that the relators were detained in quarantine by reason of their refusal to permit themselves to be vaccinated; that for several months previously smallpox had been present to an alarming extent in the city of Brooklyn and had been epidemic in that city, and that the utmost precaution and most thorough preventive measures were necessary in order to prevent the spread of the disease beyond control. It is then alleged in the return, as a well-established scientific fact, that vaccination is a preventive of that disease. The health commissioner then proceeds to state as follows: "That, as I was informed and believed, before ordering the quarantine to be placed upon the said premises and that said persons be detained therein, the said William H. Smith (one of the relators) is the proprietor of an express delivery business, and that the said Cummings (the other relator) is employed by him in said business, and that they are both actively engaged in the prosecution thereof in the cities of New York and Brooklyn and especially in Greenpoint and the eastern district of said city of Brooklyn, which latter has been one of the worst infected centres of said city. That said business is of a general nature, and may include the carrying of trunks, bedding, furniture and numerous other articles which may come from infected centres and be infected with the germs of smallpox; and it became at once apparent to me that the said Smith and Cummings were unusually exposed to such contagion, and that they might be seized therewith and by communication with others spread the same; and that it was, therefore, of special importance that they should be vaccinated at once." The return then goes on to state that a quarantine was ordered to be placed upon the premises and the persons contained therein, until they consented to be vaccinated, and that such measures were taken in order to protect the citizens of Brooklyn, in the belief that if the said Smith



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and Cummings were permitted to continue in their said business without being so vaccinated they might be the means of most serious fatal consequences to other citizens. The return alleges that there had been at least twenty-eight cases of smallpox in and about the 17th ward of the city and that a proclamation of great and imminent peril had been made by the mayor and the president of the medical society of the county of Kings. The proclamation, to which reference is made in the return, is annexed and refers to the measures and acts declared to be necessary by the commissioner of health and approves of them, and declares that the peril from an impending epidemic of smallpox shall be deemed to exist, etc. The acts and measures, which that declaration approves, are stated over the signature of the commissioner of health, who declares them necessary to be taken for the preservation of the public health from the impending pestilence of smallpox. They are stated to be; "First: Thorough and sufficient vaccination of every citizen, who has not been successfully vaccinated within such period of time as, in the judgment of the commissioner of health, renders such person immune, should be procured. Second: Wherever any person in said city shall refuse to be vaccinated, such person shall be immediately quarantined and detained in quarantine until he consents to such vaccination." The relators demurred to the return and, after a hearing, were discharged from the commissioner's custody. They appealed to this court from an order of the General Term which reversed the order, etc., discharging them.

*Charles J. Patterson* for appellants. The demurrer to the return only admits the facts that are stated in that document and not all the recitals contained in the papers annexed to it. (*Russell v. Mayor, etc.*, 2 Den. 474.) Under the statutes applicable to this case the questions whether the overruling necessity exists, and whether the remedy is appropriate, are judicial ones to be passed upon by the courts whenever a citizen challenges the right of the commissioner to interfere with his person or property. (*People ex rel. v. Board of*

*Health*, 140 N. Y. 1; *Young v. Flower*, 22 N. Y. Supp. 332.) The other statutory provisions referred to by the respondent are plainly insufficient to justify his action in restraining the appellants. (Laws of 1893, chap. 661; Laws of 1888, chap. 583.) The policy of the law of this state has not been to make vaccination compulsory upon the people. (Laws of 1893, chap. 661, § 118.)

*Alexander H. Van Cott* for respondent. The provisions of the charter of Brooklyn make the commissioner of health, the mayor and the president of the Medical Society of Kings County, the judges of the existence of great and imminent peril to the public health of the city by reason of impending pestilence. (Laws of 1888, chap. 583, § 5; *Harrison v. Baltimore*, 1 Gill, 264; *Brown v. Purdy*, 22 J. & S. 109.) They having thus declared the existence of this great and imminent peril, the statute made it the duty of the commissioner of health to take, do and cause to be done, such measures and acts as he in good faith declared the public safety and health to demand, and the mayor and president of the medical society approved in writing. (Laws of 1888, chap. 583, § 5.) The statutes make the commissioner of health, whom they charge with the duty of carrying out and doing these measures and acts, the sole judge of what means and subordinate officers shall be employed in the performance of these duties. (*Wood v. Moorehouse*, 45 N. Y. 368, 376; *People ex rel. v. Board of Health*, 140 id. 1.) Concurrently with the charter provisions, the general law relating to local boards of health requires the commissioner to provide vaccination for all who need it in the event of an actual epidemic of smallpox; and at all times to require the isolation of persons exposed to contagious or infectious diseases. (Laws of 1893, chap. 661, § 24.) The legislature had the power to confer the authority and impose the duties conferred and imposed by these acts. (*Kerrigan v. Force*, 68 N. Y. 381; *People v. Durstan*, 119 id. 569; 37 id. 661, 670; *Health Dept. v. Knoll*, 70 id. 530, 536; *R. R. Co. v. Husen*,

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95 U. S. 465, 471; *Lawton v. Steele*, 119 N. Y. 226; *Morgan v. Louisiana*, 118 U. S. 455, 462, 464; *People ex rel. v. Warden, etc.*, 144 N. Y. 529; *People v. Ewer*, 141 id. 129; *Young v. Flower*, 22 N. Y. Supp. 332; *M. S. P. & S. R. Co. v. Milner*, 57 Fed. Rep. 276; *Seguin v. Schultz*, 31 How. Pr. 398.) Not only was there a clear case for the exercise of the power and performance of the duty devolved upon the commissioner of health by these statutes, but he exercised the power and performed the duty in a lawful and discreet manner in the case of the relators. (Const. art. 1, § 6; 37 N. Y. 661; *Murray v. H. L. & I. Co.*, 18 How. [U. S.] 272; *People ex rel. v. Keeler*, 99 N. Y. 463, 479; *Happy v. Mosher*, 48 id. 313; *Henderson v. Mayor, etc.*, 92 U. S. 260; *Miller v. B. & M. R. R. Co.*, 70 N. Y. 223.) The judge at Special Term should have dismissed the writ and remanded the relators to the custody of the commissioner to be detained by him for such portion of the period of sixty days fixed by the proclamation as he in his discretion might deem necessary. (Laws of 1886, chap. 533, § 5; *People v. Cavanagh*, 2 Park. 650; *People v. Nevins*, 1 Hill, 154; *People v. Cassell*, 5 id. 164; *People ex rel. v. Liscomb*, 60 N. Y. 589, 605; *People ex rel. v. Jacobs*, 66 id. 8; *People v. Baker*, 89 id. 460; *In re Parker*, 5 M. & W. 31; *In re Shuttleworth*, 9 Ad. & El. 651; *Ex parte Dixon*, 1 Abb. [N. C.] 118; *Ex parte Lamont*, 11 id. 120; Code Civ. Pro. § 2039; *People v. Grant*, 111 N. Y. 584; *People v. McEwen*, 67 How. Pr. 105.)

GRAY, J. The question presented, like all those which involve the right to restrain the citizen in his personal liberty, or to interfere with his pursuit of a lawful avocation, demands a careful consideration of the provisions of law, under which the right is alleged to be conferred. Where such a right is claimed, it must appear very clearly and satisfactorily, not only that it has been conferred by the law, but, also, that in its exercise the facts were present which justified it. The validity of the law is not so much called in question, as the right to enforce its provisions is. For his authority,

the respondent refers to certain provisions of the charter of the city of Brooklyn (Chapter 583, title 12); where the health commissioner is empowered as follows: "Section 5. In the presence of great and imminent peril to public health of the city of Brooklyn, by reason of impending pestilence, it shall be the duty of said commissioner to take such measures \* \* \* for the preservation of the public health from such impending pestilence as he may in good faith declare the public safety and health to demand, and the mayor of the said city and the president of the Medical Society of Kings County shall also in writing approve. And such peril shall not be deemed to exist, except when and for such period of time as the mayor, president of the medical society and the health commissioner shall by proclamation declare." The provisions of section 14 of chapter 661 of the Laws of 1893 (the "Public Health Law"), which relate to "contagious and infectious diseases," are, also, referred to. They are that, "Every such local board of health shall guard against the introduction of contagious and infectious diseases by the exercise of proper and vigilant medical inspection and control of all persons and things arriving in the municipality from infected places, or which from any cause are liable to communicate contagion. It shall require the isolation of all persons and things infected with or exposed to such disease, and provide suitable places for the treatment and care of sick persons who cannot otherwise be provided for. \* \* \* It shall provide at stated intervals a suitable supply of vaccine virus, etc., \* \* \* and at all times provide thorough and safe vaccination for all persons in need of the same." It would seem from a consideration of these provisions of law that, while responsibility and a wide authority have been conferred upon the respondent in the administration of his important office, nevertheless, the statute contemplates, when persons or property are to be affected by the isolation mentioned, that the fact must exist, either that they are infected with the contagious disease, or that they were exposed to it. But I find no warrant for the rather extraordinary declaration

of the commissioner that "wherever any person shall refuse to be vaccinated, such person shall be immediately quarantined and continued in quarantine until he consents to such vaccination." Of course, if we could regard it as a mere expression of his opinion as to what measures would be necessary to prevent pestilence, this document would not demand our consideration; but, being issued officially and with the formal approval of the mayor and the president of the Medical Society of Kings County, as required by the city charter, it assumes the importance of a public and official paper, and the inquiry suggests itself as to the authority for its terms. That the powers conferred upon the health commissioner by the provisions of the city charter give to him the right to compel the vaccination of every citizen in the city of Brooklyn, if he would escape quarantine, seems an unnecessary and it is an unwarrantable inference from the language. It is difficult to suppose that the legislature would invest local officials with such arbitrary authority over their fellow-citizens and the language of an act would have to be very plain before the court would be warranted in giving it such a construction. But the legislature has done nothing of the kind. In the presence of imminent peril to the public health of the city, by reason of an impending pestilence, he may take such measures as he declares the public safety demands and which are approved by the mayor and the president of the medical society. This language is sufficient to confer the needed authority to do all acts which in his judgment, as approved by his associates in the matter, are necessary to be done to improve the sanitary conditions of the city and to preserve the public health from being affected. That authority would, undoubtedly, be sufficient to deal summarily with cases where persons are stricken with a contagious or infectious disease, or have been actually exposed to it, and it is broad enough for every practical purpose in dealing with the facts of any case presented; but the authority is not given to direct, or to carry out, a quarantine of all persons, who refuse to permit themselves to be vaccinated and it cannot be implied.

Certainly no power should be implied from an act, which is not necessary to its due execution; and where the liberty and the property of persons are sought to be brought within its operation, the case must be clearly seen to be within those intended to be reached.

Passing to the question of what power is vested in the commissioner by virtue of his office, under the Public Health Law, it is very clear that an "isolation of all persons and things" is only permitted when they are "infected with or exposed to" contagious and infectious diseases. That that language means, when speaking of persons and things "exposed" to disease, the actual fact and not a mere possibility, is plain from the language which precedes it in the section. The local board of health is to guard against the introduction of contagious and infectious diseases, by the exercise of medical inspection and control of persons and things, either arriving from infected places, or from any cause liable to communicate contagion. Obviously, there must be an inspection of persons and things and the resulting discovery, if they are not actually "infected" with disease, that they have been "exposed" to it, and that the conditions actually exist for a communication of contagion, in order to bring into operation the power to isolate. The meaning of the particular language in the section is, and it should read, that the board of health shall "require the isolation of all persons and things infected with, or *who have been exposed* to such diseases." In the present case, the relators are not alleged to have been infected with any contagious or infectious disease, or to have been exposed to such. The allegations of the commissioner of health are based only upon information and belief and, when referring to the necessity for the stringent measures adopted towards the relators, they simply assert the prosecution of a general express business, which is, in part, carried on through what "has been one of the worst infected centres of the city." It is not alleged that the business had included the carrying of infected articles, or articles from infected centres, or that the relators had been exposed to

contagion; but possibilities, merely, are alleged. It is alleged that the business *may* include the carrying of articles, which *may* come from infected centres and the relators *might* be seized with smallpox; and, if they were permitted to continue in their business without being vaccinated, they *might* be the means of serious consequences to other citizens with whom they came in contact. Such allegations fall far short of stating facts, upon which the commissioner of health would be authorized to take such drastic measures, as to effect the imprisonment of citizens by quarantining them in their houses. He had no jurisdiction to make the order here, unless there was, in fact, before him a case where the parties were either infected with, or had been actually exposed to the disease of smallpox. It was necessary to that jurisdiction that the danger should actually have existed, in the infection of the person or things, or in their having been exposed to the disease. (See *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1.) While he was vested with great and extensive powers, in order, in the presence of danger, to act summarily for the preservation of the public health, he was bound to show a state of facts which justified such an exercise of those powers.

I think no one will dispute the right of the legislature to enact such measures as will protect all persons from the impending calamity of a pestilence and to vest in local authorities such comprehensive powers as will enable them to act competently and effectively. That those powers would be conferred without regulating or controlling their exercise, is not to be supposed and the legislature has not relieved officials from the responsibility of showing that the exercise of their powers was justified by the facts of the case. The question here is not whether the legislature had the power to enact the provisions of section 24 of the Health Law; but whether the respondent has shown that a state of facts existed, warranting the exercise of the extraordinary authority conferred upon him. Like all enactments which may affect the liberty of the person, this one must be construed strictly; with the saving

consideration, however, that, as the legislature contemplated an extraordinary and dangerous emergency for the exercise of the power conferred, some latitude of a reasonable discretion is to be allowed to the local authorities upon the facts of a case.

As the respondent has utterly failed to show any facts which warranted the isolation of the relators, they were properly discharged and the order of the General Term should be reversed and that of the Special Term affirmed.

All concur, except HAIGHT, J., not voting.

Ordered accordingly.

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162	425
146	78
78	AD*616

In the Matter of the Judicial Settlement of the Accounts of  
JULIA L. JAMES (now BUTTERFIELD), as Executrix, etc.

Where a will is the subject of construction the intention of the testator, as disclosed by the will, not a general rule of construction, is to govern when they come in conflict.

A meritorious consideration is not sufficient to sustain an executory covenant, executed by a husband to his wife.

Where, therefore, a husband executed and delivered two bonds to his wife as a gift, *held*, that they were not enforceable after the death of the husband against his estate.

The bonds were secured by mortgages upon lands in another state. An action of foreclosure was brought in that state during the lifetime of the husband, in which he and his grantees were made parties defendant, and process was served upon them out of the state; he did not appear. A judgment of foreclosure and sale was entered in which the amount due upon the bonds was fixed. After the death of the husband the mortgaged premises were sold under the judgment. Upon settlement of the accounts of the widow as executrix of her husband's will, she presented a claim against the estate for the amount of the bonds less the amount realized on the sale. *Held*, that she was not entitled to an allowance of the claim; but that while said judgment had no effect to create a personal liability upon the bonds, it was conclusive as to the ownership of the mortgages and the right of the mortgagee to have the mortgaged premises sold and the proceeds applied upon the amount represented by the bonds.

Upon the day of the death of the husband, and while he was in fact dying, a clerk of the firm of which he was a member, who held a power of attorney, authorized to sign checks for the firm, was requested by a messenger from the dying man's home to draw two checks for account of the wife; this the clerk did. The messenger received and caused the



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checks to be cashed, and deposited the money to the individual credit of the wife. *Held*, that proof of these facts did not justify a finding that the checks were delivered by the husband's authority, or that the authority of the clerk under the power had been validly called into exercise.

By the will of the deceased husband he gave to his wife "for her sole use, enjoyment and benefit, during her life, without restraint, deduction or interference in any manner whatsoever," one-half of the income of all his property, "of every kind," during her life; the remainder of the income, and the estate itself, after the death of the wife, he gave to his "legal heirs," subject to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage. *Held* (BARTLETT, J., dissenting), that dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; that the intention of the testator was not to create a technical trust, but that his property should remain in specie for his widow's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it.

The other member of testator's firm died a few days before him. In an action brought by a firm creditor for the protection and distribution of the firm assets a receiver was appointed, who collected interest and dividends upon certain bonds and stocks. A judgment was rendered in said action settling the receiver's accounts and directing him to deliver over the assets to the widow, as executrix of the surviving partner. *Held*, that the judgment was not open to attack upon the accounting of the executrix, and that she was entitled to treat as income the money collected by the receiver as dividends and interest and paid over to her. Reported below, 78 Hun, 121.

(Argued April 9, 1895; decided May 21, 1895.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of May, 1894, which modified, and affirmed, as modified, a decree of the surrogate of Putnam county settling the account of Julia L. Butterfield,

as executrix of the last will and testament of Frederick P. James, deceased.

Upon the accounting of the executrix of Mr. James' will, various objections were filed on the part of his heirs and next of kin to the accounts. He left the following will; which had been dictated by him a few years before his decease.

"I, F. P. James, of Philipstown, Putnam county, New York, being of sound mind, declare this my last will and testament, revoking all former wills and codicils. I give and bequeath to my beloved wife Julia, for her sole use, enjoyment and benefit during her life, without restraint, deduction or interference in any manner whatsoever, as follows:

"*First*—One-half of the income of all my property of every kind of which I may die possessed.

"*Second*—The use, enjoyment, rental and occupation of my two residences, one known as "Cragside" in Cold Spring and Philipstown, New York, and the other known as No. 400 Fifth avenue, New York city.

"*Third*—I give, devise and bequeath absolutely to my said wife all the household furniture, pictures, plate, books, ornaments, horses, carriages, farm implements and property of every description in or upon or appertaining in any manner to the two houses and residences aforesaid. The said devises and bequests to my said wife to be in lieu of dower and right of dower. I give, devise and bequeath to my legal heirs the remainder of the income from my property during the life of my wife after the payment and discharge of all taxes, assessments and charges, interest and obligation against my estate, except as hereinafter provided, in case of interference. I give, devise and bequeath to my legal heirs, except as herein provided otherwise, the reversion and ownership of all my estate and property after the death of my wife, with the reservation, exception and direction, that in the event of any of my legal heirs making any attempt directly or indirectly, in any manner or form to interfere with or restrain in any manner my beloved wife from full enjoyment, use, management and direction and disposition of the property and income

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of my estate, as herein devised, then and in that event such one of my legal heirs as shall do or perform or aid or abet the performance of such an act, or cause the same to be done, shall be forever debarred from any part, parcel, interest or ownership, or inheritance to any of my property, and be excluded from sharing in the same, and the share that would otherwise have gone to him or her shall be divided among the remaining heirs according to law. I authorize and direct my executrix in her discretion to sell and convey such portion of my property as may be requisite or necessary to pay and discharge my just debts and obligations.

"I constitute and appoint my wife Julia L. James, my sole executrix and direct that no bond, obligation or surety be required from her."

Mr. James left no parents, or descendants surviving him. In his lifetime he had been the senior member of the banking and brokerage firm of F. P. James and Company. There were no written articles of co-partnership between him and his partner Horace S. Taylor, and the finding is that the latter had one-fifth interest in the profits and was to bear one-fifth of the losses of the firm. Mr. Taylor predeceased the testator by a few days. The executrix and the next of kin have appealed from the order of the General Term, which modified the surrogate's decree and, as modified, affirmed it.

Further facts appear in the opinion.

*William W. Goodrich* and *William P. Quin* for executrix, appellant. The portions of the decree by which substantial justice is obtained will be affirmed. (Code Civ. Pro. §§ 1337, 1338, 2545, 2586; Redf. Surr. Pr. [4th ed.] 892; *In re Ross*, 87 N. Y. 514; *In re Cottrell*, 95 id. 329; *In re Keleman*, 57 Hun, 165; 126 N. Y. 73; *Loder v. Whelpley*, 111 id. 239; *In re Chamberlain*, 46 N. Y. S. R. 841; *In re Williams*, Id. 791; *Doolittle v. Stone*, 136 N. Y. 613; *Hurlburt v. Hurlburt*, 128 id. 420; *Porter v. Gardner*, 60 Hun, 571; *Hyde v. Kitchen*, 69 id. 280; *Bliss v. West*, 58 id. 71; *Sweet v. Northrup*, 12 Wkly. Dig. 377; *Brown v. Champlin*, 66 N. Y.

214; *Marsh v. Brown*, 18 Hun, 319; *Jackson v. T. T. S. R. Co.*, 88 N. Y. 520; *Lewis v. Duane*, 69 Hun, 28; 141 N. Y. 302; *Kelly v. Burroughs*, 102 id. 93; *Foots v. Valentine*, 48 Hun, 475; *In re Coleman*, 111 N. Y. 220; *Rosseau v. Bleau*, 131 id. 177; *Smith v. Crego*, 54 Hun, 22; *In re Sprague*, 125 N. Y. 732; *West v. Van Tuyl*, 119 id. 620; *Patterson v. Robinson*, 116 id. 193; *Donovan v. Clark*, 138 id. 631; *Turner v. Weston*, 133 id. 650; *Steubing v. N. Y. E. R. R. Co.*, 138 id. 658; *Healy v. Clark*, 120 id. 642; *Daniels v. Smith*, 130 id. 696; *Burger v. Burger*, 111 id. 523, 525; *Adams v. Fitzpatrick*, 125 id. 124; *Berger v. Varrelmann*, 127 id. 281; *Butler v. Green*, 65 Hun, 99; *Torrence v. T. N. Bank*, 70 Hun, 44; *Hosford v. Nichols*, 1 Paige Ch. 220, 226; *Goddard v. Sawyer*, 9 Allen, 78; *In re Huss*, 126 N. Y. 537; *Wines v. Mayor, etc.*, 70 id. 613.) The surrogate's allowance of Mrs. Butterfield's claim and decree for its payment should have been affirmed by the General Term. (Code Civ. Pro. §§ 942, 1317, 2739; *Teel v. Yost*, 128 N. Y. 387; *Dunstan v. Campbell*, 138 id. 70; *Porter v. Gardner*, 60 Hun, 571; *Robert v. Good*, 36 N. Y. 408; *Goddard v. Sawyer*, 9 Allen, 78, 79; *Hostard v. Nichols*, 1 Paige Ch. 220, 226; *Mooney v. U. P. R. R. Co.*, 60 Iowa, 347; *F. Ins. Co. v. Highsmith*, 44 id. 330, 333; *Baker v. Jamison*, 73 id. 698, 701; *Lazier v. Westcott*, 26 N. Y. 146; *Woodruff v. N. Y., L. E. & W. R. R. Co.*, 129 id. 27; *Hewitt v. Rankin*, 41 Iowa, 35; *Pennybacker v. Leavy*, 65 id. 220; *Bucklin v. Bucklin*, 1 Keyes, 145; 1 Abb. Ct. App. Dec. 42; Thomas on Mort. § 113; 4 Kent's Comm. [13th ed.] 465; 1 Pars. on Cont. [7th ed.] 459; 1 Bouvier's Law Dict. [15th ed.] 375; *Van Amburgh v. Kramer*, 16 Hun, 205; *Fuller v. Artman*, 69 id. 546; *Beard v. Nuthall*, 1 Vern. 427; *Isenhardt v. Brown*, 2 Edw. Ch. 341; 2 R. S. 137, § 84; *Hunt v. Johnson*, 44 N. Y. 27; *Brown v. Austin*, 35 Barb. 341; *Cushman v. Addison*, 52 N. Y. 628; *Woodward v. James*, 115 id. 346; Whart. on Const. § 495; Story on Const. §§ 515, 537, 543; *Bolen v. Bolen*, 44 Hun, 362;

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*Ennis v. Ennis*, 48 Hun, 15; *Richmond v. Richmond*, 78 N. Y. 354; *Cardee v. Lord*, 2 id. 269; *Diefendorf v. Diefendorf*, 132 id. 100; *Spencer v. Carr*, 45 id. 406; *Bliss v. West*, 58 Hun, 71; *Power v. Lester*, 23 N. Y. 527; *Gillig v. Maass*, 28 id. 191; *Van Amburgh v. Kramer*, 16 Hun, 205; *Wilbur v. Warren*, 104 N. Y. 192; *Riley v. Mayer*, 96 id. 331; *Osborne v. Moss*, 7 Johns. 161; *Waterbury v. Westervelt*, 9 N. Y. 598; *N. Y. L. Ins. Co. v. Aitkin*, 125 id. 660; *Barr v. N. Y., L. E. & W. R. R. Co.*, Id. 263; *Wright v. Chapin*, 74 Hun, 54; *Leach v. Linde*, 70 id. 145; *Neilley v. Neilley*, 89 N. Y. 352, 356; *In re Rider*, 38 N. Y. S. R. 29; *Kyle v. Kyle, Executor*, 67 N. Y. 400; *Garlock v. Vanderwort*, 128 id. 374; *Burkhalter v. Norton*, 3 Dem. 610; *Guernsey v. Miller*, 80 N. Y. 181; *Peyser v. Myers*, 135 id. 599; *O'Brien v. Young*, 95 id. 429; *Loos v. Wilkinson*, 113 id. 485, 502; *Bennett v. Cook*, 2 Hun, 526.) There was no foundation laid for the claim of contestants that the executrix should be charged with the value of the Lyon county lands, less the amount of taxes. (*Burger v. Burger*, 111 N. Y. 523; *Martin v. Hodges*, 45 Hun, 38.) The testator's intent as to the management of his estate should control the decision of the questions involved in these appeals. (*Woodward v. James*, 115 N. Y. 346; *Galle v. Tode*, 74 Hun, 542; *Crim v. Starkweather*, 136 N. Y. 635; *Fanon v. Mason*, 76 Hun, 408; *Adler v. M. E. R. Co.*, 138 N. Y. 173; *In re Hart*, 60 Hun, 516; Code Civ. Pro. §§ 721, 723; *Boughton v. Flint*, 74 N. Y. 477; *Bainbridge v. McCullough*, 1 Hun, 488; *Bellinger v. Potter*, 36 N. Y. S. R. 601; *In re Ryalls*, 74 Hun, 205; 80 id. 459.) The payment to Mrs. James of \$2,500 by the check of the firm of F. P. James & Co. on the day of her husband's death cannot be questioned, and the General Term's modification of the surrogate's decree in that respect was erroneous. It neither constitutes a set-off nor counterclaim against the debt due to her from the estate nor grounds for surcharging her account. (*Bank of N. Y. v. Vanderhost*, 32 N. Y. 553.) The suit of *Young v. James et al.*, in which the receiver was appointed, was brought

by a creditor of the firm, and was necessary for the preservation of the estate's interest in the assets of F. P. James & Co. (*Fisher v. Banta*, 66 N. Y. 468.) The division of the stocks and bonds between the executrix and Jansen was made on a proper basis. (*King v. Leighton*, 100 N. Y. 386; *Baldozier v. Haynes*, 57 Iowa, 683; *Houston v. Lane*, 62 id. 291; *Kyne v. Kyne*, 48 id. 21; *Sully v. Nebergall*, 30 id. 214; *Watrous v. Winn*, 37 id. 72.) All the dividends of the Hastings and Dakota Railway Company were income, and should not be treated as principal in the determination of any of the questions involved in this accounting. (*Clarkson v. Clarkson*, 18 Barb. 646; *Toule v. Forney*, 14 N. Y. 423.) The executrix was properly credited with the sums paid to her attorneys and counsel, and to which the appellants objected. (*Fowler v. Lockwood*, 3 Redf. 465; *Gilman v. Gilman*, 6 T. & C. 211; 63 N. Y. 41.) No question is before the court as to the securities sold or those on hand on May 29, 1890. (*Weston v. Ward*, 4 Redf. 415.) The executrix should not be charged in this accounting for any of the remaining personal property. (*O'Connor v. Gifford*, 117 N. Y. 275.) The settlement of the executrix's accounts can be had from time to time as circumstances permit. (*In re Tilden*, 98 N. Y. 434; Code Civ. Pro. §§ 2514, 2722-2724, 2739-2743.) The surrogate's allowance of \$2,985 to "Harlan J. Woodward, a contestant, or to Frank E. Smith, his guardian *ad litem*," was unauthorized by law and unwarranted by the evidence. The General Term improperly affirmed it at \$2,500. (*In re Budlong*, 100 N. Y. 203; *In re Holden*, 126 id. 589-596; *In re Wilson*, 103 id. 374; *McKuskie v. Hendrickson*, 128 id. 555; *Foster v. Kane*, 1 Dem. 67; *Rigg v. Crugg*, 26 Hun, 89; *H. F. Ins. Co. v. G. F. Ins. Co.*, 138 N. Y. 252.) The executrix was right in not paying the mortgages on the Rockingham apartment house. (*Woodward v. James*, 115 N. Y. 352; 1 R. S. 749.) The General Term erred in not granting the motion of the executrix for the dismissal of the appeals taken by Charles D. Chase, Cornelia A. James, Julia C. Prescott, and by the executors of

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Edward D. James and Ella E. James, individually. (*Alexander v. Alexander*, 104 N. Y. 643.)

*Frank E. Smith* for Henry A. James and others, appellants. The dividends in question are capital and not income. (*Woodward v. James*, 115 N. Y. 346.) The retention of the stocks in question was unlawful and a violation of duty on the part of the executrix. (Williams on Exrs. 1717-1719; *Lacey v. Davis*, 4 Redf. 402; *Hughes v. Empson*, 22 Beav. 181; *Howe v. Earl of Dartmouth*, 7 Ves. 137; 2 W. & T. L. C. [6th Eng. ed.] 321; *Morgan v. Morgan*, 14 Beav. 72; *Thornton v. Ellis*, 15 id. 193; *Blann v. Bell*, 2 DeG., M. & G. 776; *Holgate v. Jennings*, 24 Beav. 623; *Brown v. Gellatly*, L. R. [2 Ch. App.] 751; *Porter v. Baddeley*, 5 id. 542; *Macdonald v. Irvine*, 8 id. 112; *Covenhoven v. Shuler*, 2 Paige, 122, 132; *Cairns v. Chaubert*, 9 id. 160; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Calkins v. Calkins*, 1 Redf. 337, 339; *Livingston v. Murray*, 68 N. Y. 485, 492; *In re Housman*, 4 Dem. 404, 413; *Kinmonth v. Brigham*, 5 Allen, 270; *Westcott v. Nickerson*, 120 Mass. 410; *Healey v. Toppa*, 45 N. H. 243; *Buckingham v. Morrison*, 136 Ill. 437; *Ackerman v. Vreeland*, 14 N. J. Eq. 23; *Howard v. Howard*, 16 id. 486; Bispham's Eq. [5th ed.] § 139; 1 Perry on Trusts [4th ed.], § 465; Hill on Trustees, 380; *T. G. T. Co. v. C. B. & Q. R. R. Co.*, 64 Hun, 1; 138 N. Y. 657; *Gillespie v. Brooks*, 2 Redf. 349; *Tuttle v. Gilmore*, 36 N. J. Eq. 617; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Adair v. Brimmer*, 74 N. Y. 539.) The will does not provide that the personal estate left by the testator shall be enjoyed in specie by the widow. Neither are the stocks now in question the subject of a specific bequest. (*Morgan v. Morgan*, 14 Beav. 72-82; *Macdonald v. Irvine*, L. R. [8 Ch. Div.] 101; *Cufe v. Bent*, 5 Hare, 24; *In re McDougal*, 141 N. Y. 21; *Collins v. Collins*, 2 M. & K. 703; *Hinves v. Hinves*, 3 Hare, 609; *Ellis v. Eden*, 23 Beav. 543; *Alcock v. Sloper*, 2 M. & K. 699; *Wearing v. Wearing*, 23 Beav. 99; Lewin on Trusts [9th Eng. ed. 1893], 319, § 4; *Pickup v.*

*Atkinson*, 4 Hare, 624, 630; *Woodward v. James*, 115 N. Y. 346; *Green v. Britten*, 1 DeG., J. & S. 649.) Assuming the money in question to be dividends, in the ordinary sense of the term, they are not income and do not belong to the life tenant. (1 Jarman on Wills [6th Am. ed.], 577; 2 Williams on Exrs. [R. & T. Am. ed. 1895] 699; 2 Lindley on Part. [Ewell's ed. 1881] 1418; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Fearns v. Young*, 9 id. 549; *Dimes v. Scott*, 4 Russ. 195; *Taylor v. Clark*, 1 Hare, 161; *Morgan v. Morgan*, 14 Beav. 72; *Meyer v. Simonsen*, 5 DeG. & S. 723; *Wightwick v. Lord*, 6 H. L. Cas. 217; Llewellyn on Trusts, 29 Beav. 171; *Brown v. Gellatly*, L. R. [2 Ch. App.] 751; *Porter v. Baddeley*, L. R. [5 Ch. Div.] 542; *Daines v. Eaton*, W. N. 95; *Cairnes v. Chaubert*, 9 Paige, 160; *Kinmonth v. Brigham*, 5 Allen, 270; *Healey v. Toppan*, 45 N. H. 243; *Buckingham v. Morrison*, 136 Ill. 437.) Assuming the stock in question to have been lawfully retained by the executrix, yet the dividends having been paid out of capital remain capital. (*Gibbons v. Mahon*, 136 U. S. 549, 564; *Bouch v. Sproule*, L. R. [12 App. Cas.] 385; *Cragg v. Riggs*, 5 Redf. 82, 92; *Riggs v. Cragg*, 26 Hun, 89, 106; 89 N. Y. 479, 487; *In re Kernochan*, 104 id. 618; *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 id. 637; *In re Skillman*, 2 Con. 161; *Knight v. Lidford*, 3 Dem. 88; *Goldsmith v. Swift*, 25 Hun, 201; *Vinton's Appeal*, 99 Penn. St. 434; *Thomson's Est.*, 153 id. 332; *Balch v. Hallett*, 10 Gray, 402; *Heard v. Eldredge*, 109 Mass. 258; *Gifford v. Thompson*, 115 id. 478; *Gilkey v. Paine*, 80 Maine, 319; *Hite v. Hite*, 93 Ky. 257, 267; *Armitage v. Garnett*, 3 Ch. 337; *In re Malam*, Id. 578; *People ex rel. v. Davenport*, 30 Hun, 177.) The executrix is chargeable with interest on so much of the dividends as she appropriated to her own use. (Perry on Trusts [4th ed.], § 468; *Manning v. Manning*, 1 Johns. Ch. 527; *Morgan v. Morgan*, 4 Dem. 353; *King v. Talbot*, 40 N. Y. 76, 96; *Adair v. Brimmer*, 74 id. 539, 555.) The rule for apportioning the moneys actually realized from the stocks now in question, as between capital and



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income, is this: Treat the whole amount of dividends collected by the executrix up to the date of the decree, including the interest with which she is chargeable by reason of her appropriation of them, as representing the value of the stocks, and then find the sum which, had it been put at interest at the testator's death, would amount to the aggregate of the dividends and interest at the date of the decree. This sum is capital, and the difference between it and the total of dividends and interest is income. (*Williamson v. Williamson*, 6 Paige, 298, 307; *Roosevelt v. Roosevelt*, 5 Redf. 264; *Kinmonth v. Brigham*, 5 Allen, 270; *Healey v. Toppan*, 45 N. H. 243; 1 Jarman on Wills [6th ed.], 576.) The interest and dividends collected by the receiver of F. P. James & Co. are not income of the estate of F. P. James. (*Woodward v. James*, 115 N. Y. 346; *Fearns v. Young*, 9 Ves. 549; *Kinmonth v. Brigham*, 5 Allen, 270.) The Taylor estate was not entitled to receive any part of the firm assets in specie. (*Know v. Gye*, L. R. [5 H. L.] 656; *Preston v. Fitch*, 137 N. Y. 41; *Menagh v. Whitwell*, 52 id. 146; *Staats v. Briston*, 73 id. 264; *Sage v. Woodin*, 66 id. 578.) Interest on the capital invested by Mr. James in the partnership ought to have been allowed. (*Johnson v. Hartshorne*, 52 N. Y. 173; *Leserman v. Bernheimer*, 113 id. 39, 48; *Bradley v. Brigham*, 137 Mass. 545; *Winchester v. Glazier*, 152 id. 316; *Morris v. Allen*, 14 N. J. Eq. 44; *Bullock v. Bemis*, 3 N. Y. Supp. 390.) The retention by the executrix of stocks and bonds was not legal or proper. (*Gillespie v. Brooks*, 2 Redf. 349; *Hughes v. Empson*, 22 Beav. 181; Perry on Trusts [4th ed.], § 439; Code Civ. Pro. § 2472, sub. 3; *Hyland v. Baxter*, 98 N. Y. 610; *Haight v. Brisbin*, 100 id. 219; *Judd v. Warner*, 2 Dem. 104; *King v. Talbot*, 40 N. Y. 76, 90, 91; *Adair v. Brimmer*, 74 id. 539, 555.)

*William C. Wallace* for Chase and others, respondents. The moneys received on account of the stocks owned by the estate belonged to the remaindermen, not to the life interests. They were not income. (*Wheeler v. Perry*, 18 N. H. 304;

*Heard v. Eldredge*, 109 Mass. 258; *Gifford v. Thompson*, 115 id. 478; *Barkley v. Wainwright*, 14 Ves. 66; *Clarkson v. Clarkson*, 18 Barb. 646; *Vinton's Appeal*, 99 Penn. St. 434; *Balch v. Hallett*, 10 Gray, 402; *Harvard v. Amory*, 9 Pick. 446; *Perry on Trusts* [4th ed.], § 545; *Knight v. Lidford*, 3 Dun. 88; *Scovel v. Roosevelt*, 5 Redf. 121; *Riggs v. Cragg*, 26 Hun, 106; 89 N. Y. 479; *In re Matter of Skillman*, 9 N. Y. Supp. 469; *In re Kernochan*, 104 N. Y. 627; *In re Robinson*, L. R. [3 Ch. Div.] 134; *Townsend v. U. S. T. Co.*, 3 Redf. 220; *Moss' Appeal*, 83 Penn. St. 264; *Reed v. Head*, 6 Allen, 174.) The Jansen-Taylor transaction cannot be approved. (Lindley on Part. 329, 353; *Smith v. Bodine*, 74 N. Y. 30; *Smith v. Tarlton*, 2 Barb. Ch. 336; *In re Underhill*, 117 N. Y. 475.) If the Jansen-Taylor transaction be approved as far as it goes, it was still incomplete, and the executrix's accounts must be surcharged by the sum of \$1,170.05 on account of the securities, and the sum of \$24,083.51 on account of the western lands, and by one-fifth of the taxes paid on the western lands, with interest on all the sums from May 14, 1886, the date of the partial settlement with Jansen. (*Schultz v. Pulver*, 11 Wend. 361; *O'Connor v. Gifford*, 117 N. Y. 279; *Baker v. Kingsland*, 3 Ch. Sent. 73; *Wood v. Byington*, 2 Barb. Ch. 387; *Miller v. White*, 50 N. Y. 141.) The dealings of Mrs. Butterfield, her agents, attorneys, aiders and abettors, with the Iowa lands and the bonds and mortgages, were in gross violation of her duties as executrix and trustee under the will. (Redf. Surr. Pr. [4th ed.] 537; *Coleman v. Coleman*, 5 Redf. 524; *Seabury v. Bowen*, 3 Bradf. 207; *Griswold v. Griswold*, 4 id. 277; *Gunning v. Carman*, 3 Redf. 69; *Bates v. Underhill*, Id. 365; *O'Connor v. Gifford*, 117 N. Y. 281; *Schultz v. Pulver*, 11 Wend. 363; *McCabe v. Fowler*, 89 N. Y. 314; *Rogers v. Rogers*, 3 Wend. 503; *Van Horne v. Fonda*, 5 Johns. Ch. 409.) The mortgages on the Rockingham apartment house owned by the estate and the accompanying bonds are debts of the testator, now due and payable, and should be paid out of the personal estate. (*Mosley v. Marshall*, 22 N.

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Y. 200, 205, 206; *Bell v. Mayor, etc.*, 10 Paige, 49; *House v. House*, Id. 158; *Hepburn v. Hepburn*, 2 Bradf. 76; *Wetmore v. Parker*, 52 N. Y. 451; *Quinn v. Hardenbrook*, 54 id. 83.)

*Walter M. Rosebault* for executors of E. D. James and another. As to Ella E. James, individually, the referee has not made any conclusion of law to the effect that she is affected by the paper referred to. (*Shaw v. Kidder*, 2 How. Pr. 244; *Mandeville v. Reynolds*, 68 N. Y. 528; *Barrett v. T. A. R. R. Co.*, 45 id. 628; 8 Abb. [N. S.] 205; *Cox v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 414; *Gaillard v. Smart*, 6 Cow. 385.) The doctrine contended for by the executrix upon the question of the bonds would be against public policy. It would allow a man to dispose of his property in like manner as if he made his will, without the formalities and safeguards which are by statute thrown round such an instrument. (*Whitaker v. Whitaker*, 52 N. Y. 368.)

*Frank E. Smith* for Henry A. James and others, respondents. The bonds are not valid as gifts. (*Harris v. Clark*, 3 N. Y. 93; *Curry v. Powers*, 70 id. 212; *Holmes v. Roper*, 141 id. 64; *Wilson v. B. E. Society*, 10 Barb. 308; *Duvoll v. Wilson*, 9 id. 487; *Craig v. Craig*, 3 Barb. Ch. 76, 116; *Basket v. Hassell*, 107 U. S. 602, 612; *Richardson v. Richardson*, 148 Ill. 563; Pom. Eq. Juris. [2d ed.] § 1148; Code Civ. Pro. § 840; *Anthony v. Harrison*, 14 Hun, 198; 74 N. Y. 613; *Vanderbilt v. Schreyer*, 91 id. 392, 399; *Parkhurst v. Higgins*, 38 Hun, 113; *Carnwright v. Gray*, 127 N. Y. 92.) The bonds are not valid as a provision for the testator's wife. (*Hunt v. Johnson*, 44 N. Y. 27; 2 Story's Eq. Juris. [13th ed.] § 987; Perry on Trusts [4th ed.], §§ 107, 108; 3 Pom. Eq. Juris. [2d ed.] § 1293; *Whitaker v. Whitaker*, 52 N. Y. 368; *Wilbur v. Warren*, 104 id. 192; *Phillips v. Frye*, 14 Allen, 36; *Richardson v. Richardson*, 148 Ill. 563; *Harris v. Clark*, 3 N. Y. 93; *Hendricks v. Isaacs*, 117 id. 411; *Dean v. M. El. R. R.*,

119 id. 540; *Blaechinska v. Howard Misson*, 130 id. 497; *Vanderbilt v. Schreyer*, 91 id. 392.) The Iowa judgment of foreclosure and sale was nothing more or less than the ordinary one of foreclosure and sale. (*Lutz v. Kelly*, 47 Iowa, 307; *Cassidy v. Woodward*, 77 id. 354; *Pennoyer v. Neff*, 95 U. S. 714, 733; *Freeman v. Anderson*, 119 id. 185; *Scott v. McNeal*, 154 id. 34; *Durant v. Abendroth*, 97 N. Y. 132; *Shepard v. Wright*, 113 id. 582; *Fletcher v. Peck*, 6 Cranch, 87; *Phillips v. Frye*, 14 Allen, 36; *Whitaker Case*, 52 N. Y. 368.) The compensation awarded to the guardian *ad litem* of the infant contestant Woodward was authorized by law. (Code Civ. Pro. § 2566; *Weed v. Paine*, 31 Hun, 10; *McCue v. O'Hara*, 5 Redf. 336; *In re Wadsworth*, 6 N. Y. Supp. 932.) The judgment in *Young v. James* is not conclusive as to any of the matters in controversy in this accounting. (*People ex rel. v. Surrogate, etc.*, 36 Hun, 218.)

*Robert Mazet* for the executors of *Mary A. Clark*, deceased, respondents. The bonds are not valid as gifts. (*Harris v. Clark*, 3 N. Y. 93; *Curry v. Powers*, 70 id. 212; *Holmes v. Roper*, 141 id. 64; *Wilson v. B. E. Society*, 10 Barb. 308; *Duvoll v. Wilson*, 9 id. 487; *Craig v. Craig*, 3 Barb. Ch. 76, 116; *Baskett v. Hassell*, 107 U. S. 602, 612; Pom. Eq. Juris. § 1148; Code Civ. Pro. § 840; *Anthony v. Harrison*, 14 Hun, 198; 74 N. Y. 613; *Vanderbilt v. Schreyer*, 91 id. 392, 399; *Parkhurst v. Higgins*, 38 Hun, 113; *Carnwright v. Gray*, 127 N. Y. 92; 1 Pars. on Cont. 234.) The bonds are not valid as a provision for the testator's wife. (*Hunt v. Johnson*, 44 N. Y. 27; Story's Eq. Juris. § 987; Perry on Trusts, §§ 107, 108; Pom. Eq. Juris. § 1293; *Whitaker v. Whitaker*, 52 N. Y. 368; *Wilbur v. Warren*, 104 id. 192; *Phillips v. Frye*, 14 Allen, 36; *T. T. B. Church v. Cornell*, 117 N. Y. 601; *Lutz v. Kelly*, 47 Iowa, 307.)

*Charles S. Clark* for guardian *ad litem*, respondent. The surrogate had absolute discretion as to granting the allowance to the guardian. His power to make such allowance existed independently of the Code and statutes. Such allowance

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should not be regarded as costs, nor as extra allowance within the meaning of section 3252 *et seq.* of the Code of Civil Procedure. (*Weed v. Paine*, 31 Hun, 10; 4 Civ. Pro. Rep. 305; *In re Wood*, N. Y. L. J., Dec. 30, 1891; Redf. Surr. Pr. [2d ed.] 769; *McCue v. O'Hara*, 5 Redf. 366; *Foster v. Kane*, 1 Dem. 67; *Schell v. Hewitt*, Id. 249.) The order or decree of the surrogate granting compensation to a guardian, being wholly discretionary, is not reviewable by the Court of Appeals as "resting in discretion." (Code Civ. Pro. § 190; *Provost v. Provost*, 70 N. Y. 141; *Hannahs v. Hannahs*, 68 id. 610; *Kane v. Lorillard*, 85 id. 184; *Coleman v. Phillips*, 24 Hun, 320; *Gooding v. Brown*, 35 id. 155; *Lav v. McDonald*, 9 id. 27; *Getty v. Donnelly*, Id. 608; *Steere v. Childs*, 15 id. 511, 521; *Russell v. Dufton*, 4 Lans. 408; *Dickson v. McElwain*, 7 How. Pr. 138; *Howell v. Mills*, 53 N. Y. 522; *Bolles v. Duff*, 43 id. 469; *Anon.*, 59 id. 315; *Lawrence v. Farley*, 73 id. 187; *Sherman v. Strauss*, 52 id. 504; *Underwood v. Green*, 56 id. 247; *Bank of Geneva v. Spencer*, 18 id. 150; *Beards v. Wheeler*, 76 id. 213; *Lunney v. Campbell*, 72 id. 496; *King v. Barnes*, 9 Cent. Rep. 719.) It being a question of fact and not of law whether a special guardian is entitled to compensation, the decision upon the question by the surrogate is not reviewable. (*In re Valentine*, 100 N. Y. 607; *Lawrence v. Farley*, 73 id. 187; *Quincey v. White*, 63 id. 670; *Davis v. Clark*, 87 id. 623.) The allowance of compensation to a special guardian resting on discretion, and not upon statute, is not a substantial right and is not reviewable. (Code Civ. Pro. § 190; *Howell v. Mills*, 53 N. Y. 322; *Lawrence v. Bainbridge*, 56 id. 72; *Mills v. Davis*, 53 id. 349.) The order or decree of which appellant complains having been made upon her default to oppose it is not reviewable. (Code Civ. Pro. § 2568; *Mayor v. Cornell*, 9 Hun, 215; *Bailey v. Stone*, 4 How. Pr. 346; *Wehle v. B. Bank*, 8 J. & S. 161; *People v. Oakes*, 1 How. Pr. 195.) The appellant not having adopted the remedy of the Code against errors of a surrogate has lost her right to appeal. (*In re Hawley*, 100 N. Y. 206.) The power of the

court below to make statutory allowance is not subject to review by the Court of Appeals. (*Connaughty v. S. C. R. R. Co.*, 92 N. Y. 481; *Noyes v. C. A. Society*, 70 id. 481; *Harris v. Bennett*, 2 C. R. 23; *Morse v. Hasbrouck*, 63 How. Pr. 84; *Briggs v. Brown*, 13 Abb. Pr. 481.) An appeal will be dismissed unless a proper undertaking is served. (*Reese v. Boisea*, 92 N. Y. 632.) Where questions of fact are involved (as the question of fact as to whether the guardian deserved compensation and the amount of the same), and the case was in such form before the General Term (as it here was), that it could review the questions of fact, an appeal to this court brings up nothing for review and is improper. (*Randolph v. Loughlin*, 49 N. Y. 456; *Wright v. Hunter*, 46 id. 409.) Provisions for a guardian's compensation may be made irrespective of whether statutory costs or allowances were granted. And it is, therefore, immaterial whether costs were granted to the guardian or not. The fact he was awarded costs does not debar him from having compensation. (*Weed v. Paine*, 31 Hun, 10.)

GRAY, J. The first of the questions we shall consider is one which arises upon the appeal of the executrix. She made a personal claim, amounting to \$127,123.16, which the surrogate allowed; but which the General Term, upon appeal, disallowed. The facts upon which it was based are these: In 1879, a few years before the death of Mr. James, he executed and delivered to his wife two bonds; one of which was conditioned for the payment of \$43,920, one year after date, and the other for the payment of \$30,720, one year after date. Both bonds bore interest and were secured by mortgages upon lands in the state of Iowa; the legal and record title to which was in Mr. James. A few days afterwards, Mr. James conveyed all of the lands covered by these mortgages to a grand-nephew of Mrs. James; at the time an infant of the age of nine years. It was found with respect to this latter transaction that it was advised as a mode of delaying, and to enable legal proceedings to be taken to defeat, the payment of taxes, which

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had been laid upon them and which were believed to be illegal. In 1882 a suit was commenced to foreclose the mortgages by Mrs. James; who made her husband and the infant Wheeler, the grantee of the lands, parties defendant. Process in the suit was served outside of the state of Iowa upon the defendants, but Mr. James did not appear. In 1883, judgment of foreclosure and sale was entered, in which the amount due to Mrs. James upon the bonds was fixed at \$94,973.83. No sale was made during the lifetime of Mr. James under the decree; but, after his death and in 1885, Mrs. James caused a sale to be made, at which the mortgaged premises were sold for the sum of \$5,280. The decree of foreclosure and sale gave no judgment against Mr. James personally, forasmuch as the District Court in Iowa had acquired no jurisdiction to render judgment *in personam* upon a service without the state and without personal appearance of the party served. The claim of the executrix is for the whole sum secured by the two bonds, with interest from their date, less the amount realized upon the sale of the lands. The surrogate found, with respect to the delivery of the bonds and mortgages, that they were a gift by Mr. James to his wife and that he was not indebted to her at the time in any sum whatsoever. He allowed her claim on the ground that they were enforceable obligations in the hands of Mrs. James against the estate of her husband, regarded either as a gift, or as a provision for her in addition to the bequests of the will. I think that the General Term correctly held that the executrix had no claim upon these bonds, which she could enforce against the estate in her hands, and that she had obtained all the relief in the foreclosure suit to which she was entitled. These bonds amounted, simply, to the promise of Mr. James to pay, at some future day, the sum mentioned, without any consideration to support that promise. Such a voluntary promise cannot be enforced against the donor, or against his executors or administrators. (See Pomeroy's Equity Jurisprudence [sec. 1148]; Story's Equity Jurisprudence [sec. 987].) By the latter authority, it is stated as follows: "The general

principle is established, that in no case whatsoever will courts of equity interfere in favor of mere volunteers, whether it be upon a volunteer contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child."

The question of the validity of a gift, in the form of a promise to pay, only, without consideration, was elaborately considered in *Harris v. Clark* (3 N. Y. 93) and it was there held, to quote the language of Judge RUGGLES, "that a voluntary promissory note without consideration is not, as the law now stands, the subject of a valid gift by the maker, either as a present donation, or as a gift to take effect at the death of the donor." The fact that in that case the subject of the gift was a bill, or draft, does not affect its application to the case of a bond; inasmuch as no presumption of a valuable consideration obtains from the presence of the seal, in view of the findings of fact that the bonds were executed and delivered as a gift and not because of any indebtedness. In *Whitaker v. Whitaker* (52 N. Y. 368), the question discussed was whether a meritorious consideration was sufficient in equity to sustain a promissory note given by a husband to his wife, as against his collateral heirs; and the conclusion reached by Judge PECKHAM (in which all his associates concurred), after a review of the English authorities, was that the law was well settled, contrary to the doctrine in the early case of *Wright v. Wright* (1 Cow. 598), "that a meritorious consideration, or the duty to provide for a wife or child, is not sufficient to support an executory covenant." The case of *Hunt v. Johnson*, (44 N. Y. 27), was referred to in the opinion and deemed to be without the rule; because it was a case of an executed sale or transfer of real estate, to uphold which natural affection is undoubtedly a sufficient consideration. Nor does the fact that the gift in *Whitaker v. Whitaker* was of a promissory note, which the husband made in his lifetime for the purpose of making a provision for his wife, affect the question as an authority in point; for the same reason that I have mentioned in reference to the case of *Harris v. Clark*.



It is unnecessary to discuss a question which has been well treated at the General Term, further than to say that I think that they were right in holding that, while the Iowa judgment of foreclosure had no effect to create a personal liability upon the bond, it was conclusive as to the ownership of the mortgages and the right of Mrs. James to have the lands therein described sold and the proceeds applied upon the amount represented by the bonds. The importance of that holding seems to be that the contestants upon the accounting are precluded from inquiring either as to the right of the executrix to sell the land, or as to whether she held the mortgage in trust for the firm of F. P. James & Co.

Another question, as to which the executrix has appealed, is with reference to the payment to her of \$2,500 upon the day of the testator's death. It seems that, in the morning of that day and while Mr. James was in fact dying, a clerk of F. P. James & Co., holding a power of attorney to sign checks for the firm, was requested by some one, acting as a messenger from the residence, to draw two checks for Mrs. James' account, one for \$1,000 and the other for \$1,500. Upon the clerk's demurring to the request, he was assured that it was all right and he then drew the checks, which the messenger caused to be cashed and deposited to the individual credit of Mrs. James. The surrogate found that these checks were delivered to Mrs. James by her husband's authority; but the General Term has reversed the surrogate in that respect; holding that there is no evidence to sustain the finding. I think their conclusion was correct and that the facts of the transaction would not warrant any inference that the authority of the clerk, under the power which he held from the firm, had been validly called into exercise. If the transaction had been merely one, as to which all we knew was that the clerk had delivered the checks to Mrs. James, an inference might have been possible, which is quite rebutted by the circumstance that the clerk only drew and delivered them when moved to do so by a messenger; whose source of authority to make the request was not shown to be in Mr. James.

One of the most important questions raised upon the accounting was, whether dividends received upon the stocks of certain railroad construction companies should be treated as capital, or as income. Two of the companies constructed railroads and upon their sale received land grants in payment. The other company also constructed and sold a railroad, but received in part payment a certificate of indebtedness secured by a mortgage upon land. The surrogate apportioned the dividends, paid by these corporations since the death of Mr. James, by holding so much as were derived from the purchase price of lands sold to be capital and so much as were derived from interest on deferred payments on contracts of sale, or upon the certificate of indebtedness, he held to be income. The General Term reversed that ruling and held that all the dividends were income. If there was nothing in the language of this will, which evidenced an intention on the part of the testator that his widow should have and enjoy as income whatever actually came into the estate *eo nomine* and as he had been himself in the habit of receiving, I should hesitate very much to say that the General Term were correct. Undoubtedly, the dividends declared by these companies were from their capital, because they had no source of income other than from their sales of land and dividends could not be derived in any other way. These corporations were peculiar, in that their only business, after the expenditure of their capital in the construction of railroads, was to sell the lands received in payment and to divide the proceeds, as received, among their stockholders. In that respect, of course, there was a distinction between them and corporations which are engaged in ordinary business enterprises and receive returns in the way of earnings upon the invested capital. Their dividends were, in truth, ordinary and not extraordinary; for the reason that they were the only ones which they could, in the nature of things, make. I think, however, we may consider the question before us upon a broader ground, where, in connection with kindred questions, it may be disposed of by the application of the rule of intention. Whether the rule, with

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relation to the respective rights of the life tenant and remaindermen, shall so apply, in the case of a testator's estate, as that the personalty shall be converted and invested in such permanent and legally recognized forms as shall benefit both the tenant for life and the remainderman, may depend upon the form and language of the will. It seems to me that in this case the intention of the testator, that his personal estate shall remain in specie, the income of which should be received and enjoyed by his wife as it had been by himself, is manifest. At the time when he made his will he had no children, nor descendants of children. The will was drawn at his own dictation and peculiarly expresses his great affection for his wife and his desire that her enjoyment of his estate and the benefits which she was to derive from it were to be without any regard to those who, after her death, were to have the reversion of his property and whom he defines by the very general and generic term of his "legal heirs." In the first place, his language is "I give and bequeath to my beloved wife Julia, for her sole use, enjoyment and benefit during her life, without restraint, deduction or interference in any manner whatsoever, as follows: *First*. One-half of the income of all my property of every kind of which I may die possessed." He then gives her the use of his town and country residences and makes the absolute bequest of all household furniture, pictures, plate, books, ornaments, horses, carriages, farm implements and property of every description, in, or upon, or appertaining in any manner to the two houses and residences. He then proceeds as follows: "I give, devise and bequeath to my legal heirs the remainder of the income from my property during the life of my wife after the payment and discharge of all taxes, etc. \* \* \* except as hereinafter provided in case of interference. I give, etc., to my legal heirs \* \* \* the reversion and ownership of all my estate and property after the death of my wife, with the reservation, exception and direction, that in the event of any of my legal heirs making any attempt directly or indirectly, in any manner or form,

to interfere with or restrain in any manner my beloved wife from full enjoyment, use, management and direction and disposition of the property and income of my estate, as herein devised, then and in that event such one of my legal heirs as shall do or perform or aid or abet the performance of such an act, or cause the same to be done, shall be forever debarred from any part, parcel, interest or ownership, or inheritance to any of my property. \* \* \* I authorize and direct my executrix in her discretion to sell and convey such portion of my property as may be requisite or necessary to pay and discharge my just debts and obligations."

It stands out very clearly from the peculiar and strong language selected by the testator, that the interest which was to be enjoyed by his "legal heirs" in the estate was subordinated to the interest of his wife. To him she was everything and they were, merely, kindred, having by law certain claims which he was not indisposed to recognize and which he provided for in the manner described. Although in the case of *Woodward v. James* (115 N. Y. 346), we held that a legal trust was created of the testator's real and personal estate, not given to the widow absolutely for her life, we reached that conclusion, inasmuch as it was necessary, because of the authority and duty imposed upon the widow, that the legal title should be vested in her as trustee. Of course there was nothing in the language used in the will, which conveyed the idea that the testator intended or thought of a trust; but the exigencies of the situation, in our judgment, required the creation of a trust by implication. The question might have been a very different one, if the language of the will spoke of a trust, or indicated the notion of the testator that his wife, with respect to the management and use of the property, should be clothed with the duties of a trustee and guided by the strict rules to which trustees are subjected. In this case, while a trust is created by implication, all of the stringent injunctions of the testator with respect to his widow's use, enjoyment, or control, of the property, remain with all their meaning. The one-half of the income of "all of his property of every kind,"

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of which he might die seized, is given to his wife "without restraint, deduction or interference in any manner whatsoever." Such language, in connection with that subsequently used, enjoining his legal heirs against attempting to interfere with the "full enjoyment, use, management and direction and disposition of the property and income of his estate," under penalty of being excluded from any interest or share therein, contains most significant expressions of an intention that his widow should have a half of the income of his property "of every kind," which could not be cut down and which she was fully to enjoy and manage. It is also significant that the direction to sell is only in the event of a sale becoming necessary to discharge debts. I cannot read this will without, not only inferring the intention of the testator to have been that his property should remain in specie for his wife's benefit and subject to her uncontrolled management, but also seeing therein that intention to be plainly expressed. It is inconceivable that Mr. James, in drawing a will in such language, had the intention that his widow should at once convert and capitalize the estate in such forms of investment as the law sanctions, by rules established for the construction of wills colorless as to any expression of intention. To quote the words of Lord Chancellor COTTENHAM, in *Pickering v. Pickering* (4 My. & Cr. at p. 300), "I think it would be a violation of the testator's intention not to allow the wife to enjoy the income of the property as it is." This case differs from others which have been cited, in that the testamentary disposition was not strictly of an estate to be enjoyed in succession by different persons. One-half of the income of the testator's property is given to his legal heirs and though it may have proved to be, as counsel has put it, an illusory gift, because of the burdens imposed upon their share of first discharging thereout all the taxes and charges against the estate, nevertheless, the situation was, and is, that of a division of the income of the property between the widow and the testator's legal heirs. To the extent that their half of the income is applied in payment of taxes and other charges, their rever-

sionary interest is protected, and benefited, and they can only complain of the testator's subordinating their interests so completely to those of his widow. The counsel for the heirs has made a very able and ingenious argument, which he has fortified by reasoning upon cases in the English courts, as well as upon some in this country; but all the cases that I have seen recognize that the rule of intention must always override established rules of construction. It is only where the instrument fails to express, or to disclose, an intention, that we must resort to the rules which have been established by the decisions of the courts. That an intention is manifest in the will in question, I have endeavored to show. We have only to put ourselves in the testator's situation, when he was making his will and therein providing for the enjoyment of his estate by his wife, to be impressed with the conviction that he had no idea of constituting a technical trust, with all its duties and obligations; but, without children, or descendants, he draws a will in his own strong language, making what he supposed to be an ample provision for his wife during her life and one in harmony with the conditions under which she had lived. He cares little for others, in comparison, if we may judge from the language of his will; but he recognizes the claims of that general class designated as his "legal heirs."

I deem it of considerable significance, when considering this case in connection with others, to which our attention has been referred, and in addition to the difference in the facts and phraseology upon which I have commented, that this testamentary disposition was not that of a gift of the residuary estate to trustees; although even in such a case a plain intention discoverable in the will would prevail against an arbitrary rule of law. In *Jarman on Wills*, (p. \*613), it is said with reference to a residuary devise that the same principle applies, "if an intention that the property shall be enjoyed in specie can be collected from the terms in which either the life interest, or the ulterior subject of disposition, or both these interests, is or are bequeathed." In this case, as in every other case where a will is the subject of construction, it is the inten-

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tion of the testator and not the rule of construction which is to govern, when they come in conflict. In *Redfield on Wills* (2 vol. \*478), it is said that, "Where there is anything in the will from which it may fairly be inferred that the testator expected the tenant for life to enjoy the property specifically, it cannot be converted into money or public funds; but the remainderman must take his chance of anything remaining after termination of the life estate." These latter remarks were made with reference to the case of *Howe v. Earl of Dartmouth*.

*Howe v. Earl of Dartmouth*, (7 Ves. 137), is considered to be the leading case in England, upon the question whether property bequeathed by a testator shall be retained in specie, or whether, if of the perishable class of securities, it shall be converted in such a way as to produce capital bearing interest. The rule as laid down by Lord Chancellor ELDON in that case, as explained by subsequent decisions, among which is particularly to be mentioned that of Lord COTTENHAM in *Pickering v. Pickering*, (*supra*), is this; that where there is a residuary bequest of personal estate, to be enjoyed by several persons in succession, a court of equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession and, as the only means of giving effect to such intention, will direct the conversion of personally into permanent investments of a recognized character. Lord ELDON laid down the rule in that case, because of the absence of language in the will from which the direction of the testator might be inferred that his estate should continue as it was. Some difference of opinion has existed among the English judges with respect to the application of the rule laid down in *Howe v. Earl of Dartmouth*, which, in the recent case of *Macdonald v. Irvine*, (L. R., 8 Ch. D. 101), is adverted to in the opinion of Lord Justice THESIGER. In the previous case of *Hinves v. Hinves* (3 Hare, 611), Vice-Chancellor WIGRAM had said: "The court in applying the rule has leant against conversion as strongly as is consistent with the suppo-

sition that the rule itself is well founded." In *Morgan v. Morgan* (14 Beav. 72), the master of the rolls, Sir JOHN ROMILLY, said that, "the effect of the later cases has been to allow small indications of intention to prevent the application of the rule." Lord THESIGER, referring to the leaning of these judges, with others, against the application of the rule, adopts the following words of Lord ROMILLY: "That unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe v. Earl of Dartmouth* is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done the rule must apply. \* \* \* In almost all, if not all, the cases which have been cited in argument, where such an intention was found to exist, \* \* \* we find either words in their natural and literal sense importing use or enjoyment of the property in the state in which the testator left it at his death, or directions contained in the will as to the conversion of the property which were inconsistent with a conversion by the court taking place upon the death of the testator." In that case the lords justices divided in opinion, as to whether any of the elements existed in the will under consideration to show the intention of the testator that the case should be taken out of the general rule; but they all agreed, if there was a sufficient indication of intention in the will itself to that effect, that the personalty should remain in specie until after the death of the testator's wife. While there the testator gave to his wife for life "all the income, dividends and annual proceeds of his entire estate," there were not present these significant words of injunction against any "deduction," or any interference with her use, enjoyment, or management.

In *Blunn v. Bell* (2 De Gex, Macn. & G. 775), the principle was distinctly recognized that the intention in the will should govern upon the question of the retention of property in specie and that where it is seen to exist the case will be



taken out of the general rule. In *Collins v. Collins* (2 My. & K. 703), the language of the gift to the wife is not unlike, in its effect, to that in the present case. The testator there gave "all and every part of his property in every shape and without any reserve and in whatever manner situated, for her natural life," and at her death the property was to be divided among his father, brothers and a sister. Sir JOHN LEACH, M. R., held the rule in *Howe v. Earl of Dartmouth* did not apply. In this state the rule laid down in the *Earl of Dartmouth's* case was early adopted, as applicable in the absence of any indication of an intention on the part of the testator that the legatee for life should enjoy the property in its then state. (See *Spear v. Tinkham*, 2 Barb. Ch. 211, and other cases cited on brief for heirs.) In every case, in this, or any other state, however stringently that rule is applied as between a tenant for life and remainderman, it is the absence of manifest or plain intention which sets it in operation. In *Clarkson v. Clarkson* (18 Barb. 646), the decision of the question of the disposition to be made of extraordinary dividends was referred to the discoverable intention of the testator. The case of *King v. Tulbot* (40 N. Y. 76), frequently cited, has no application. The question discussed was with reference to how the discretion of trustees is prudently and lawfully exercised in the investment of moneys held for the benefit of minors and a very strict rule was laid down.

What I have said is applicable to the question of the right of the widow to retain in specie the personal estate bequeathed and to her right to have and to enjoy the income from it, as it had been received by the testator in his lifetime.

The testator knew about his investments. They were spread out on his books and the comprehensive words of a gift of his "property of every kind," "without restraint, deduction or interference in any manner," are especially significant of the intention that his widow should have whatever came into the estate in the form in which he left it.

The point is, also, made by the contestants that certain interests and dividends, collected upon certain stocks and

bonds prior to his discharge by the receiver, who was appointed of the firm property, should have been carried to capital, instead of being credited to, and distributed as, income. The question concerns the receiver's liquidation of the partnership affairs. In an action brought within a few months of the testator's decease by a creditor of the firm, for the protection and distribution of its assets, a receiver was appointed; who continued until December, 1885, when a judgment in the action was rendered, settling his accounts and directing him to deliver over the assets in his hands to Mrs. James; who was entitled, in her capacity as executrix of the surviving partner, to settle with the legal representatives of the deceased partner. Under the provisions of Mr. James' will his executrix became vested at once with the title to all of his estate, in the capacity of a trustee for the purposes mentioned. Included in the property of the estate was the testator's interest in the firm of F. P. James & Co. The direction as to his widow's right to one-half of the income applied, of course, as well to that species of property. For the reasons I have just expressed, she was under no obligation to convert and to capitalize those assets, or the income received thereon. The interest of Mr. James' partner, Mr. Taylor, was in one-fifth of the profits of the business and that interest, which, upon his death, vested in Mrs. Taylor as his executrix, has been settled with. So far as the question of the winding up of the partnership business is concerned, I fail to find any substantial ground for the objection of the contestants as to the treatment by the receiver of the income and expenses. The evidence is that twenty per cent of the income was credited to the Taylor account; to which was, also, charged its due proportion of the expenses of the receivership. That seems to me to have been a proper method of liquidating the business. The decree in the receivership action passing on the accounts is not open to attack in this proceeding and, with respect to the right of the executrix of Mr. James to treat as income the particular moneys collected by way of dividends and interest and paid over to her by the receiver, I do not see how the next of kin

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can be heard to complain. That was her right under the provisions of the will and indirectly, if not directly, they were benefited by all that was income to the estate.

Objection was made by the contestants to the settlement which was effected by the executrix as to the interest of her husband's former partner, Mr. Taylor. He predeceased Mr. James by a few days only, leaving his widow sole executrix. Pending the administration of the receiver, who had been appointed of the partnership property, Mrs. James commenced negotiations for a settlement with Mrs. Taylor as to the claims of the Taylor estate. They eventually agreed upon the sum of \$27,000, after varying more or less widely in their estimates of what was due upon the Taylor interest. The settlement was not, however, consummated between them. Mr. Jansen then became the purchaser from Mrs. Taylor and took from her a transfer of all claims, which the Taylor estate had against the assets of F. P. James & Co.; including certain lands in Iowa and Texas. However this arrangement was brought about, is only matter of inference. There is nothing to show that Mrs. James had any interest in the Jansen purchase. She doubted her right to complete her negotiations with Mrs. Taylor and the latter was advised by her counsel not to sell to Mrs. James, either individually, or as executrix. After Jansen became the representative of the Taylor interest, and when Mrs. James had become possessed of the assets upon the discharge of the receiver, a settlement was reached, upon statements made by an accountant as to the firm affairs, which were based upon figures showing what was due to the James estate, what was due upon the Taylor interest and what was the total cost of the securities as shown by the firm books. The increase in the figures of the statements, upon which the settlement was made with Jansen, over those in the statement made at the time of the proposed settlement with Mrs. Taylor, was accounted for by reason of the advance in value of the securities. Mrs. James then transferred to Jansen one-fifth of all the securities of the late firm and received back from him, in cash, the difference between one-fifth of their

cost price and the amount which had been found due from the firm to the Taylor estate. Upon examination of the facts upon which an adjustment of accounts and interests was reached and this settlement was made, and which are quite complicated, I am satisfied that the surrogate reached a correct conclusion and that the evidence supported the findings which he made. The contestants have not shown that any wrong principle was adopted; or that the facts were wanting to justify that part of his decree upon the accounting. The General Term has reviewed his decision and the question must stop there.

With respect to the question of the propriety of crediting Mr. James' capital with interest to the time of the final settlement, there is no evidence of any agreement to allow interest and the fact that, in making up previous accounts between the partners, interest had been credited is not sufficient evidence of usage to dispense with the necessity of proving a special agreement. There were no articles of co-partnership and all that was found with respect to the partnership interests was that Mr. Taylor was to have one-fifth of the profits and was, to bear one-fifth of the losses of the business. When their association of interests was dissolved by death, there was nothing upon which a right to claim interest on Mr. James' capital could rest.

As to the claims of Jansen, as assignee of Taylor's executrix, with reference to the lands in Iowa and Texas, they do not seem to have been comprised within the settlement. Such claims must be the subject of future arrangement.

The questions which I have considered with respect to this accounting are all which demand any review by us. The record is very voluminous and has required much time for its consideration. Without further discussion of the matter, I am satisfied with the correctness of the conclusions reached by the General Term, in its order upon the surrogate's decree, and I, therefore, advise its affirmance; with costs to all parties who have appeared by counsel and have filed briefs upon this appeal, to be paid out of the estate.

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All concur, BARTLETT, J., upon all points except as to the alleged dividends of the construction companies, so called, he holding the judgment should be entirely reversed so far as it decides the dividends paid by the companies to be income and the accounts changed accordingly; FINCH J., not voting.

Ordered accordingly.

THE PEOPLE ex rel. E. DEVILLO ROOT, as Supervisor, etc.,  
Respondent, v. THE BOARD OF SUPERVISORS OF THE COUNTY  
OF STEUBEN, Appellant.

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Under the provisions of the "Highway Law" (§ 130, chap. 568, Laws of 1890), fixing the liability for the expenses of the construction and repair of public free bridges as between a town and county, the right of a town to demand contribution from the county when the bridge expenditure of the town is in excess of one-sixth of one per cent of the assessed valuation of its taxable property, is not limited to expenditures for bridges which cross streams forming boundaries of the town, but applies as well to bridges erected wholly within the town.

In proceedings by mandamus to compel the county of Steuben to levy a tax to pay the proportion alleged to be due from it under said act of the expense incurred by the town of Addison for the repair and construction of bridges, it appeared that a portion of the expenditure was for the construction of a bridge in the village of Addison in said town. By the village charter the bridge was excepted from the the jurisdiction of the village authorities, and left under the control of the commissioners of highways of the town. It was claimed by the board of supervisors that the bridge was not a town bridge within the statute.

*Held*, untenable.

Reported below, 81 Hun, 216.

(Argued April 23, 1895; decided May 21, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 2, 1894, which affirmed an order of Special Term granting an application by the relator for a peremptory writ of mandamus.

The writ required the board of supervisors of Steuben county to levy upon the taxable property of the county the sum of

\$1,840.03, part of the expenses incurred by the town of Addison for bridge purposes during the year preceding November 1, 1893. It appeared from the application that the bridge crossing the Canisteo river in the village of Addison, in the town of Addison, in 1892, became unsafe and was condemned by the state engineer and surveyor, and upon application of highway commissioners of the town the town board authorized the construction of a new bridge in place of the one condemned; that a new bridge was built; that the cost of the new bridge and of repairs upon other bridges of the town during the year mentioned was \$7,144.62. In November, 1893, highway commissioners of the town made and delivered to the supervisor of the town a verified statement pursuant to section 132 of the Highway Law (Chap. 568, Laws of 1890) of the expenses incurred in the erection and repair of bridges in the town during the previous year, showing that the county was indebted to the town in the sum of \$1,840.03, that being one-third of the excess of said expenditure above one-sixth of one per cent of the total assessed valuation of said town for the year 1893. The supervisor of the town, pursuant to section 133 of the Highway Law, presented the statement to the board of supervisors at its session in November, 1893, and the board disallowed the claim on the ground that it was not, nor was any part thereof a legal charge against the county.

On the return of the order to show cause, the board of supervisors appeared by counsel, and after hearing the parties the peremptory writ was granted requiring the board to convene and levy upon the taxable property of the county a sum sufficient to pay its share of such expenditure. The main controversy is as to the legal liability of the county of Steuben to pay any part of the cost of the bridge over the Canisteo river, the bridge being wholly within the town of Addison, and not upon its boundary. Section 130 of the Highway Law is as follows:

“Section 130. Where town or county expense. The towns of this state, except as otherwise herein provided, shall be

liable to pay the expenses for the construction and repair of its public free bridges, constructed over streams or other waters within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries, except between the counties of Westchester and New York; and when such bridges are constructed over streams or other waters forming the boundary lines of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses, except that when the whole expense in any one town, for any one year, for the construction, care, maintenance, preservation and repair of its bridges, shall exceed one-sixth of one per centum on the assessed valuation of the taxable property of the town for that year, the county in which such town is located, shall then pay not less than one-third part of such excess. Each of the counties of this state shall also be liable to pay for the construction, care, maintenance, preservation and repair of public bridges, lawfully constructed over streams or other waters forming its boundary line, not less than one-sixth part of the expenses of such construction, care, maintenance, preservation and repair."

Section 131 of the Highway Law, which was repealed by the County Law (Chap. 686 of the Laws of 1892), authorized the board of supervisors, when it should appear that any town will be unreasonably burdened by erecting or repairing any necessary free bridge "in such town or on its borders," to cause a sum not exceeding \$2,000 in any one year, "in addition to the amounts provided for in the last preceding section," to be raised and levied by the county to pay such portion of the expense of such bridge as the board may deem proper. Section 63 of the County Law took the place of section 131 of the Highway Law repealed. Section 63 is as follows: "County aid to towns for the construction and repair of bridges. If the board of supervisors of any county shall deem any town in the county to be unreasonably burdened by its expenses for the construction and repair of its bridges, the board may cause a sum of money not exceeding \$2,000 in any

one year to be raised by the county and paid to such town to aid in defraying such expenses."

Other facts are stated in the opinion.

*M. Rumsey Miller* for appellant. Mandamus will not issue in cases of doubtful right. The courts only allow the remedy to be resorted to when a clear legal right is made to appear and when there is no other adequate or legal means to obtain it. (*People ex rel. v. Bd. Suprs.*, 107 N. Y. 235, 239; *People ex rel. v. Asylum*, 122 id. 190, 196; *People ex rel. v. Bd. Suprs.*, 64 id. 600, 604; *People ex rel. v. Leonard*, 74 id. 443, 447; *People ex rel. v. Hayt*, 66 id. 606.) The papers or proof presented to the board of supervisors as basis of its action were not sufficient to authorize (much less to compel) the board of supervisors to levy the tax. They did not comply with section 132 of chapter 568 of Laws of 1890. (*Flynn v. Hurd*, 118 N. Y. 19, 26, 27, 28; *People ex rel. Everett v. Bd. Suprs.*, 93 id. 397, 403, 404; Laws 1890, chap. 568, §§ 10, 11, 12, 130.) Mandamus should not issue because no proof was presented to the board that the certificate of the state engineer and surveyor under section 145 had been made and because no such certificate had in fact been made. (*Grant v. Smith*, 46 N. Y. 93, 96, 97; *Bangs v. Strong*, 7 Hill, 250; *Calvo v. Davis*, 8 Hun, 222; 73 N. Y. 211.) Mandamus would not lie in this matter because the board acted on the claim. They received the claim, referred it to the proper committee, it considered it and reported to the board, and they rejected the claim. (*B. C. Cemetery v. City of Buffalo*, 46 N. Y. 506, 509; *Hospital v. Mayor, etc.*, 84 id. 108, 115; *People ex rel. v. Comrs.*, 76 id. 64, 73; *People ex rel. v. Barnes*, 44 Hun, 574, 576; *People ex rel. v. Leonard*, 74 N. Y. 443, 445, 447.) The Highway Law does not compel the county to raise one-third of the excess in a year in which the excess has not been contributed to by the construction of a bridge upon a stream forming the boundary line of the town, and it does not compel the county to pay when the excess is caused alone by the construction and repair of bridges con-



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structed over streams or other waters within the bounds of the town, and hence mandamus should not issue. (§ 130, chap. 568, Laws of 1890; Laws of 1883, chap. 346; Laws of 1869, chap. 855; 2 R. S. 1214; Laws of 1857, chap. 615; Laws of 1838, chap. 314; Laws of 1849, chap. 104; 2 R. S. [7th ed.] 1262, §§ 119, 120, 121; *Hill v. Bd. Suprs.*, 12 N. Y. 52; *B. C. Cemetery v. City of Buffalo*, 46 id. 506; *R. Hospital v. Mayor, etc.*, 84 id. 108; *People ex rel. v. Comrs.*, 76 id. 64; Laws of 1892, chap. 686; *Huggins v. Riley*, 125 N. Y. 88, 91; *Mather v. Crawford*, 36 Barb. 564, 565, 566.) The act, if it compels the county to levy any tax upon the other towns or cities to pay any part of the expense of bridges within the borders of another town, is in conflict with the provisions of section 11 of article 8 of the Constitution. (Laws of 1890, chap. 568, §§ 3, 4, 9, 12; *Hill v. Bd. Suprs.*, 12 N. Y. 52; *In re Flatbush*, 60 id. 398; *People ex rel. v. Kelly*, 76 id. 475; *In re Mayor, etc.*, 99 id. 569.) The bridge in question, upon which the expense of \$6,265 was claimed, was not a bridge of any class mentioned in section 130 of the Highway Law. (Laws of 1873, chap. 200; Laws of 1870, chap. 291; Laws of 1884, chap. 308; Laws of 1887, chap. 513; Laws of 1880, chap. 308, § 2; Laws of 1877, chap. 344, §§ 1, 2; Laws of 1866, chap. 770, § 1; Laws of 1878, chap. 377, §§ 2, 3.) If any writ should issue in this case it should be an alternative writ. (Laws of 1892, 2183, §§ 10, 11, 12; *W. I. B. Co. v. Barrett*, 1 N. Y. S. R. 600; *Birge v. B. B. Co.*, 133 N. Y. 477; Code Civ. Pro. § 2070; *People v. R., W. & O. R. R. Co.*, 103 N. Y. 95, 105.)

*John F. Parkhurst* for respondent. The county is liable to pay one-third of the total bridge expenditure of any town for bridges wholly within the town or otherwise in excess of the one-sixth of one per cent. (Laws of 1890, chap. 568, §§ 130, 131.) An inspection by the state engineer was not necessary. (Laws of 1890, chap. 568, §§ 132, 133.) The fact that an itemized statement by the highway commissioner was not filed with the supervisor until after November first does

not relieve the county of its obligation to pay this sum. (*In re N. Y. P. School*, 47 N. Y. 557.)

ANDREWS, Ch. J. The important question in this case is whether, under the Highway Law, a county is bound to contribute to the expense of a free public bridge constructed by a town wholly within its bounds, and not crossing border lines, when the whole cost exceeds one-sixth of one per centum on the assessed valuation of the taxable property of the town. The question depends upon the true construction of section 130 of the Highway Law (Chap. 568 of the Laws of 1890). The courts below have answered this question in favor of the town and against the county. It is claimed in support of this conclusion that the reasonable construction of the section makes a county liable to pay one-third of the total bridge expenditure of any town in any one year, for bridges wholly within the town or otherwise, in excess of the one-sixth of one per cent on the assessed valuation of the property of the town. It is on the other hand contended in behalf of the county of Steuben, that the section in question imposes no duty upon a county to contribute to the expense of erecting a bridge which is wholly within a town, but that the compulsory clause in the section applies only to bridges on streams which divide towns in the same county, or towns in different counties. In other words, that the right to demand contribution from the county only exists when the bridge crosses boundary lines either of towns or counties, or both.

At the time of the passage of the act of 1890 the compulsory obligation of a county to aid in the construction of bridges was limited to bridges across county boundaries. From the foundation of the state government the duty of maintaining highways and bridges has been cast on the towns, and not, as in England, upon counties. But from time to time special statutes were passed changing the rule in special cases. (See *Hill v. Supervisors, etc.*, 12 N. Y. 52.) The legislature also recognizing the hardship which would frequently arise in

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imposing the whole burden of maintaining a bridge upon a particular town, at an early day authorized boards of supervisors to grant relief in their discretion to an overburdened town to the extent of one thousand dollars a year, and to put upon the county a charge to that extent for the benefit of a town. This power, first given by chapter 186 of the Laws of 1801, the exercise of which was made subject to revision by the Court of Common Pleas on application of a commissioner of highways dissatisfied with the determination of the supervisors, was subsequently confirmed and continued by the Revised Laws of 1813 (Vol. 2, p. 282, § 33), and later by the Revised Statutes (1 Rev. St. 524, § 119 *et seq.*). By chapter 482 of the Laws of 1875 a further advance was made for the relief of towns, and, in case of a bridge crossing a county line, each of the counties interested was made absolutely liable to pay one-sixth of the expense thereof. This brief reference to the prior legislation shows that when the Highway Law of 1890 was enacted the obligation rested upon the towns to construct bridges, whether wholly within the town or connecting two towns within a county, or towns in different counties, and that no compulsory obligation rested upon a county to aid in constructing bridges, except in the single case of a bridge crossing a county line. In the case of a bridge wholly within a town, or connecting two towns in the same county, the board of supervisors possessed discretionary power to aid to the extent of \$1,000 a town which it deemed overburdened. The Highway Law of 1890 consolidated and revised the prior legislation of the state upon the subject of highways. It was not strictly a consolidation of the prior statutes. New provisions were engrafted on the antecedent law for the purpose of improving the highway system. It is conceded that section 130 enlarged the pre-existing liability of a county by imposing an absolute obligation upon the county to pay a proportion of the cost of a bridge across the border line of two towns in the same county, in case of an excess of cost to each town beyond one-sixth of one per cent of the assessed valuation of the property therein.

But it is insisted that the obligation was not imposed in respect of a bridge wholly within a town, however large an expenditure might be required for its construction. As to a town so situated it is insisted the only resource is an application to the discretion of the board of supervisors. It is difficult to suppose that a construction of section 130, which imposes an imperative obligation upon a county, in case two towns in the same county are interested in the bridge, each of which must bear its equal share of the burden, and frees it from obligation, when a single town happens to be traversed by a stream, not upon its boundary, over which a bridge is required, could have been intended by the legislature. If any greater measure of relief was required than was given under prior legislation, the single town upon which the duty to build a bridge alone rests, would seem to have the strongest claim to the consideration of the legislature and of the county. The section is not free from obscurity. It recognizes in the first clause the general principle of our legislation, that the construction of highways and bridges is a town duty and charge, but the declaration of liability is coupled with the words, "except as herein otherwise provided." There is no exemption from liability to be found in the section, applicable to the case of a bridge constructed within a town, unless the obligation imposed on the county by the subsequent clause applies to such a case. Upon reading the first clause with the words of exemption, it would naturally be expected that there would subsequently be found some exemption from liability which would furnish a reason for their insertion. There is plausibility in the contention that the words in the subsequent clause, "except that when the whole expense in any one town for any one year, shall exceed," etc., relate exclusively to the matter immediately preceding, namely, bridges constructed on boundary lines. But the words of the exception are very general and comprehensive. The county is to be liable "when the whole expense to any one town" shall exceed the sum stated. There is no discrimination in the language between the towns, or as to the character of the bridges. We think

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that the obscurity arising from punctuation and the arrangement of the clauses is fairly dispelled by a consideration of the whole section and the presumed legislative purpose, and by the consideration that the construction claimed by the county would lead to an unjust discrimination. The general scope of the section is, we think *first*, to declare the general liability of towns in respect of highways and bridges; *second*, to declare the liability of towns as between themselves as to bridges constructed upon boundary lines; *third*, to impose upon the county a fixed liability based upon the relation between the cost of bridges and their maintenance, and the taxable values of the town irrespective of boundary lines; and *fourth*, to impose an added liability as to bridges erected on county lines. Section 131, since repealed, but which may properly be referred to in aid of the construction of section 130, strengthens the interpretation given by the courts below to that section. It authorized the board of supervisors to levy upon the county a sum, not exceeding two thousand dollars in any one year, to relieve any town unduly burdened by the erection of a bridge, and declares that this is "in addition to the amounts provided for in the last-preceding section." The additional aid was authorized to be given to any town, and not to border towns or towns divided by a stream only. The language of section 131 implies that the towns had received benefits under section 130, and this aid was to be "in addition." We find nothing in the County Law of 1892 which affects the construction of the act of 1890.

There are some technical questions raised by the defendant: (1) It is claimed that the bridge being within the village of Addison, although the village is within the town, it was not a town bridge within the statute. The answer is that by the village charter (Laws of 1873, chap. 200) the bridges over the Canisteo river and Tuscarora creek are excepted from the jurisdiction of the village authorities and are placed under the direction and control of the commissioners of highways of the town, "to the same extent as if the act had not been passed." (2) We think the claim presented to the supervisors



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disposition thereof, in case of the death of the infant during minority, as he may see fit; and so, may bequeath it to any person, whether a minor or of full age. Such a provision is not violative of the statute providing that accumulations must be for the benefit of minors.

(Argued April 25, 1895; decided May 21, 1895.)

APPEAL from certain parts of a final judgment of the Special Term of the Supreme Court in the first judicial district, entered upon the report of a referee appointed to take an accounting after an interlocutory judgment.

The action was brought by the executors of the will of Richard H. Campbell, deceased, for a judicial settlement of their accounts, and for instructions in reference to certain accumulations in their hands as trustees.

An appeal from the interlocutory judgment was taken by the infant defendant, Rosalie Coe Campbell, to the General Term, where the judgment of the Special Term was affirmed.

An accounting was then had in accordance with the judgment on which final judgment was entered, and from this the present appeal is taken by the trustees and Rosalie.

The further material facts are stated in the opinion.

*S. P. Nash* for appellant. The case is one for the fair construction, according to the intent of the testator, of the direction to the trustees in case either of the daughters died without issue, to assign, transfer and set over the share intended for such child to the then surviving issue of the testator, in this case the defendant Rosalie. (*French v. Cheese*, 6 DeG., M. & G. 453.) The appeal should be sustained. (*Cochrane v. Schell*, 140 N. Y. 516; *Bective v. Hodgson*, 10 H. L. Cas. 656; *In re Dumble*, L. R. [23 Ch. Div.] 360; 140 N. Y. 357.)

*John W. Pirsson* and *John Alexander Beal* for respondent. The accumulations of the share of Martha Campbell belonged to and were vested in her, and upon her death passed to her administratrix or other personal representatives, to be dis-





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share to the children, if any, of such child, the issue of a deceased child to take the share the parent would have taken if living, and in case of the death of any child of mine leaving no issue him or her surviving, to assign, transfer and set over the share intended for such child to my then surviving issue, by representation and not *per capita*."

The daughter Martha died under age, intestate and unmarried, leaving her sister Rosalie surviving, an infant under the age of fourteen.

At the time Martha died the accumulations of income upon her share of the trust estate amounted to nearly thirty-seven thousand dollars, which is claimed by her mother as administratrix of her estate, and is also claimed by the guardian *ad litem* of Rosalie, her surviving sister.

The single question presented by this appeal is whether the accumulations of income upon Martha's share vested as they were paid in, or was the vesting postponed until she attained the age of twenty-one years?

This precise point has never been directly passed upon by this court, and the opposing views of learned counsel have been fully presented.

Before considering the effect of the statute relating to the accumulations of personal property we will examine the will and ascertain the intent of the testator.

It will be assumed that the testator did not intend to die intestate as to any portion of his estate.

The scheme of the will seems to us clear, and the testamentary intent fully disclosed.

So long as both of his daughters lived neither had any interest in the principal of the estate; until she attained her majority she was entitled to so much of the income of her trust as was necessary in the judgment of the trustees, and the remainder was to be accumulated until she attained the age of twenty-one years; at that time she was entitled to all accumulations of income, and thereafter received the income of the principal sum during life. If her sister died before or after attaining the age of twenty-one years, leaving no issue, the

trustees were directed "to assign, transfer and set over the share intended for such child to my then surviving issue," etc.

The learned counsel for the appellant insists that the words, "the share intended for such child," carry with them the income not used during minority, and that the true meaning of the will is that the income was designed for the use of the infant during minority, and the surplus was intended for her if she reached majority, but not otherwise; that until she attained her majority she had only a presumptive or conditional right to the income.

We are unable to adopt this view; but, taking the whole will together, we think it was the intention of the testator that all accumulations of income during infancy should vest at once, and only the time of payment or enjoyment was postponed until majority.

It was obviously the intention of the testator to discriminate between principal and income; if a child died the principal of her share passed to her issue, or to testator's other issue, or to collaterals, but the income was dealt with as a distinct fund.

Until a child died she took absolutely the entire income of her share.

When the testator, in the event of a child's death, directed transfer of "the share," he employed accurate language used in other portions of the will to describe the principal sum.

We do not, however, share the doubts expressed by the learned General Term as to the testator's power to make such disposition of the accumulated income of an infant dying during minority as he might see fit; there is no legal objection to bequeathing the same to any person whether a minor or of full age, and such a provision in a will would not violate the statute which provides that accumulations must be for the benefit of minors.

When a minor dies, for whose benefit accumulations of income have been directed, it is competent for the testator to dispose of them in the same manner as any other portion of his estate, provided they have not vested in the infant as paid in.

While we rest our decision in this case on the provisions of the will, we are also of opinion that it is the policy of the statute permitting the accumulations of personal property for the benefit of a minor (1 R. S. 773, § 3) that they should vest in the infant beneficially when received, and it is only payment over that is postponed until the expiration of the minority.

This construction of the statute finds confirmation in the provision (1 R. S. 774, § 5) to the effect that when any minor, for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support or of education, the chancellor may cause a suitable sum to be taken from the moneys accumulated, or directed to be accumulated, and to be applied to the support or education of such minor.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. \_\_\_\_\_

146	121
158	255

In the Matter of the Probate of the Last Will and Testament  
of ASHER W. MINER, Deceased.

Under the provision of the Code of Civil Procedure (§ 2545), declaring that a surrogate's decree "shall not be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," an appellate court is at liberty to disregard such an error if it could have had no influence upon the determination of the case.

Unless a residuary bequest is circumscribed by clear expressions and the title of the residuary legatee narrowed by words of unmistakable import, it will, to prevent intestacy, be construed so as to perform the office intended, *i. e.*, to dispose of all the residuary estate.

The holographic will of M., after various devises and bequests, among them a bequest to his wife of all his "household goods, furniture and fixtures and effects," contained a direction to his executors to sell and convey any and all of his real estate, not otherwise disposed of, and convert the same into personalty. The will then provided that after the aforementioned payments shall be made out of the avails of the real and personal estate the balance shall form part of the residuary estate. It was also provided that in case of failure of one of the bequests it shall

form part of the residuary estate. Then followed a clause commencing as follows: "All the rest and residue of my estate both real and personal not heretofore disposed of I give, bequeath and devise as follows All my household goods furniture and effects after the decease of myself and wife to." Following this were the names of the beneficiaries, three in number, and the method of distribution. The testator left a large estate; he had no children; the three beneficiaries had been taken into his family at an early age, and had grown up and were recognized as members of his family. *Held*, that the general plan of the will indicated the testator's intent to create a residuary estate, and to effectually dispose of the whole thereof; and so, that the general words of gift carried to the three persons named all of the residuary estate, notwithstanding the presence of the qualifying words, "as follows;" that the testator's intent in specifying the furniture, etc., which had, by the words of a previous clause, been absolutely given to his wife, was simply to limit that gift to a life estate.

Reported below, 72 Hun, 568.

(Argued April 11, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 3, 1893, which affirmed a judgment entered upon a decree of the surrogate of Allegany county, so far as the same construes the will of Asher W. Miner, deceased.

The facts and the portions of the will, so far as material, are stated in the opinion.

*James C. Smith* for Maria S. Wills and others, appellants. The testator died intestate as to the general residue of his estate. (*Gwillim v. Gwillim*, 5 B. & Ad. 122; *Taylor v. Wendell*, 4 Bradf. 324; *Jenkins v. Van Schaack*, 3 Paige, 242; *Sutherland v. Sydnor*, 84 Va. 880; *Stoker v. Van Wyck*, 83 id. 724; *Cady v. Burn*, 46 N. J. Eq. 131; *Cheeseman v. Wilt*, 1 Yeates, 411; *Cole v. Richardson*, 2 Salk. 236; *Campbell v. Beaumont*, 91 N. Y. 464; *Van Nostrand v. Moore*, 52 id. 12; *Cottman v. Grace*, 112 id. 299; *Abbott v. Middleton*, 7 H. L. Cas. 67, 113; *Howland v. Clendenin*, 134 N. Y. 303, 308, 311; *Sweet v. Burnett*, 136 id. 204; *In re McClure*, Id. 238; *Scott v. Guernsey*, 48 id. 106; *Low v.*

*Harmony*, 72 id. 114; *In re Brown*, 93 id. 295, 299, 300; *Wood v. Mitcham*, 92 id. 375, 379; *Murdock v. Ward*, 67 id. 387; *Keteltas v. Keteltas*, 72 id. 312; *Doe v. Langlande*, 14 East, 370; *Wylie v. Wylie*, 1 DeG., F. & J 410; *Blake v. Hawkins*, 98 U. S 315.) The claim of the respondents that the will, upon its face, gives them the general residue, is untenable. (*Stuart v. Bute*, 11 Ves. 666; *Newman v. Newman*, 26 Beav. 220; *Cross v. Wilks*, 35 id. 562; *Lamphier v. Despard*, 1 C. & L 200; *Ennis v. Smith*, 14 How. [U. S.] 472; *Page v. Page*, 6 Eng. L. & Eq. 346; *Foster v. Wybranti*, 11 Ir. Eq. 40; *Chalmers v. Storil*, 2 V. & B. 222; *Dean v. Gibson*, L. R. [3 Eq.] 713; *King v. George*, L. R. [4 Ch. Div.] 435; *Atty.-Gen. v. Wiltshire*, 16 Sim. Ch. 36; *Slingsby v. Grainger*, 7 H. of L. 273; *Chrystie v. Phyfe*, 19 N. Y. 344; *Taggart v. Murray*, 53 id. 233; *Doe v. Randing*, 2 B. & A. 441.) The surrogate erred in receiving, and the General Term in acting, upon extrinsic evidence. (*Miller v. Travers*, 8 Bing. 244; *Mann v. Mann*, 1 Johns. Ch. 231; 14 Johns. 1; *Jackson v. Sill*, 11 id. 201; *Doe v. Westlake*, 4 B. & A. 57; *Bunner v. Storm*, 1 Sandf. Ch. 357; *Champlin v. Champlin*, 1 Buff. Super. Ct. 355; 58 N. Y. 620; *Fosdick v. Delafield*, 2 Redf. 392; *Bradhurst v. Field*, 135 N. Y. 564; Wigram on Wills, 163; *Stimson v. Vrooman*, 99 N. Y. 74; *Brown v. Thorndike*, 15 Pick. 388; *M. L. Ins. Co. v. Hillman*, 145 U. S. 285; *Marx v. McGlynn*, 88 N. Y. 357; *Ennis v. Smith*, 14 How. [U. S.] 400.) A comparison of the will of 1885 with that of 1891 strongly supports the contention of the appellants. (*Ralph v. Carrick*, L. R. [11 Ch. Div.] 873; *In re Fowers*, 113 N. Y. 569.)

*Charles B. Wheeler* and *Arthur W. Hickman* for Charles Wheeler and others, appellants. The testator did not intend by his will to dispose of all his estate; and the appellants, who are his next of kin, contend that the Surrogate's Court erred in holding that he did not die intestate as to any part of his property, and by its decree awarding all of the residue of his estate, after paying the specific legatees, to the respondents

as legatees named in the fourteenth clause of the will. (*Kerr v. Dougherty*, 79 N. Y. 327, *Lamb v. Lamb*, 13 id. 234.) In construing wills where the contest is between the heirs or next of kin to the testator and legatees who are strangers to his blood, and the question is presented whether the testator intended to disinherit his heirs, the presumption is that he did not, and this presumption can be overcome only by clear and unequivocal language indicating a plain intent to the contrary. (Schuler on Wills, § 497; *Doe v. Dring*, 7 N. & T. 446; *Howland v. Clendenin*, 134 N. Y. 311; *Wood v. Mitcham*, 92 id. 375; *Quinn v. Hardenburg*, 54 id. 83; *Low v. Harmony*, 72 id. 480; *Scott v. Guernsey*, 48 id. 106; *In re Brown*, 93 id. 295; *Quinn v. Hardenburg*, 54 N. Y. 86; *Schull v. Rambo*, 57 Penn. St. 149; *Bacon's Appeal*, Id. 504; *Physick's Appeal*, 50 id. 128; *Areson v. Areson*, 3 Den. 461.) The intention of the testator cannot be inferred from the extrinsic facts and circumstances. The language of the will may be interpreted as in other written instruments, in the light of surrounding circumstances, but the intention must after all be found in the words of the will. (*Lamb v. Lamb*, 131 N. Y. 227; *Riker v. Cornwell*, 113 id. 115; *Floyd v. Carow*, 88 id. 560.) As the terms of the fourteenth clause are expressed in clear and unequivocal language the court cannot add to the same, nor strike out or change the relation which one word bears to another word, or to a sentence. As the testator arranged them, so they must be read without change or alteration, or punctuation, so as to destroy their import or meaning as we find them. (*Phillips v. Davis*, 92 N. Y. 177; *Stimson v. Vrooman*, 99 id. 74; *Tilden v. Green*, 130 id. 51.) The prior will of the testator, made in the year 1885, revoked and canceled on making the will now before the court, was not competent proof for any purpose, and should have been rejected by the surrogate. (*Tereta v. Robbins*, 40 Conn. 271; *Baum v. Sewell*, 3 Burr. 1775; *Wilkeson v. Adams*, 1 Ves. & B. 445; *Griscom v. Evans*, 40 N. J. 402; *Mann v. Mann*, 1 Johns. Ch. 231; *Bumfield v. Wilson*, 78 Ill. 467.) The

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property bequeathed by the fourteenth clause of the will is limited to the household goods, furniture and effects, and as to the residue of the testator's estate, not embraced in the previous specific bequests, he died intestate. (*Childs v. Wilson*, 2 Jur. 415.) If it is held by this court that the gifts to the donees are limited to such property as is embraced within the descriptive words, "all my household goods, furniture and effects," then they take no more than the household goods, furniture and other property of a like character. (*Benton v. Benton*, 63 N. H. 295; *Webster v. Wiers*, 51 Conn. 569; *Rawlings v. Jennings*, 13 Ves. 39; *Campbell v. Preston*, 15 id.; *Blank v. Higginson*, 6 Madd. 32; *Hothar v. Sutton*, 15 Ves. 310; *Dole v. Johnson*, 3 Allen, 364; *Johnson v. Goss*, 123 Mass. 433; *Roberts v. Kuffin*, 2 Atk. 113; *Ennins v. Smith*, 14 How. [U. S.] 412; *Doe v. Page*, 6 Eng. L. & Eq. 348; *Foster v. Wybrants*, 11 Ir. Eq. 40; *Sanderson v. Dobson*, 1 Exch. 141; 1 Jarman on Wills, 566; *Barnes v. Patch*, 8 Ves. 604; *Simms v. U. S. T. Co.*, 103 N. Y. 478; *Chegary v. Mayor, etc.*, 13 id. 220.) Assuming that a construction should be given to the word "effects," as used in the fourteenth clause of the will, so as to dispose of all the testator's property to the legatees named therein and not embraced in the preceding bequests, then, as a matter of law, he did not dispose of the use and income of the same during the life of Mrs. Miner, and the same should be distributed to his next of kin. (*Everitt v. Everitt*, 29 N. Y. 40, 75; *Colton v. Fox*, 67 id. 348; *Warner v. Durant*, 76 id. 136; *Livingston v. Green*, 52 id. 118; *Nelson v. Russell*, 135 id. 137; *Phelps v. Pond*, 23 id. 81; *Doughty v. Stillwell*, 1 Bradf. 311; *Haxtun v. Corse*, 2 Barb. Ch. 506; *Manice v. Manice*, 43 N. Y. 303; *Kilpatrick v. Johnson*, 15 id. 323; *Delafeld v. Shipman*, 103 id. 468; *Radley v. Kuhn*, 97 id. 26; *In re Crossman*, 113 id. 503; *Cochrane v. Schell*, 140 id. 516.)

*Charles Daniels* and *A. L. Elliott* for respondents. The law permits evidence to be received to aid in ascertaining the

testator's intention, which was a material fact put in controversy by the contestants. (*Couch v. Eastman*, 29 W. Va. 784; *Woolton v. Redd*, 12 Gratt. 196-205; *Stimson v. Vrooman*, 99 N. Y. 74-79; *Smith v. Burch*, 92 id. 226-231; *Morris v. Sickly*, 133 id. 456; *Griscom v. Evans*, 40 N. J. L. 402, 407; *Kerr v. Dougherty*, 79 N. Y. 328; *Gilman's Estate*, 154 Penn. St. 523, 530; *In re Lee*, 141 N. Y. 58, 60; *Smith v. Bell*, 6 Pet. 68, 75; *Sweet v. Burnett*, 136 N. Y. 204, 210; *Laneton v. Corlies*, 127 id. 100, 104; *Gordon v. Gordon*, 5 Eng. & I. App. 254; *Carpenter v. Carpenter*, 14 N. Y. S. R. 284; *Hensman v. Fryer*, 2 Eng. Eq. 627; *In re Wolverton*, L. R. [7 Ch. Div.] 197; *Lee v. Simpson*, 134 U. S. 572, 587; *Stagg v. Atkinson*, 144 Mass. 564, 569; *M. L. Ins. Co. v. Hillman*, 145 U. S. 285, 295; *Marx v. McGlynn*, 88 N. Y. 357; Code Civ. Pro. § 2445; *Loder v. Whelpley*, 111 N. Y. 239.) The contestants' position is that the testator has disposed of no more of his property by the fourteenth clause of his will than his household goods, furniture and effects, while the position of the proponents is that he intended to, and did by this clause, dispose of the entire residue of his property not theretofore disposed of, and that the will itself, and when read in view of the facts proved by the evidence, very plainly discloses that design. (*Byrnes v. Baer*, 86 N. Y. 210; 2 Redf. on Wills, 442; *Schult v. Moll*, 132 N. Y. 122-127; *Roods v. Watson*, 26 N. Y. S. R. 487; *Delehanty v. S. V. O. Asylum*, 29 id. 324; *Vanderpoel v. Leow*, 112 N. Y. 167, 177; *Crichton v. Symes*, 3 Atk. 61; *Doe v. Langland*, 14 East, 371.) The presumption that the testator intended to dispose of all his property by his will is confirmed and maintained by its general plan, followed by the residuary clause aptly introduced, and referred to in earlier portions of the will as the intended receptacle of all his not previously disposed of property. (*Riker v. Cornwell*, 113 N. Y. 115; *In re Bonnett*, Id. 522; *In re Crossman*, Id. 503; *Lamb v. Lamb*, 131 id. 227; *Vernon v. Vernon*, 53 id. 351; *Schult v. Moll*, 132 id. 122; *Howland v. Clendenin*, 134 id. 305;



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*Byrnes v. Baer*, 86 id. 210; *Thomas v. Snyder*, 43 Hun, 14; *Phillips v. Davies*, 92 N. Y. 199; *Saltmarsh v. Barrett*, 29 Beav. 474; *Roe v. Vingut*, 117 N. Y. 204-212; *Wager v. Wager*, 96 id. 164-172; *Lytle v. Beveridge*, 58 id. 592; *Hall v. Priest*, 6 Gray, 18; *Hodgson v. Jex*, L. R. [2 Ch. Div.] 122; *Doe v. White*, 1 East, 33; *Marquis of Litchfield v. Horncastle*, 2 Jur. 610; *Franklin v. Trout*, 15 East, 391; *Dobson v. Bowers*, L. R. [5 Eq.] 404; *Phillips v. Beal*, 25 Beav. 25; *Streatfield v. Cooper*, 27 id. 338; *Campbell v. Prescott*, 15 Ves. 499; *Pritchard v. Pritchard*, L. R. [11 Eq.] 231; *Smyth v. Smyth*, L. R. [8 Ch. Div.] 561, *Hall v. Hall*, L. R. [3 Ch. Div.] 589.) If the word "effects," as it has been used in the fourteenth paragraph of the will, should not receive so broad a construction, it is still evident from the paragraph containing it and other parts of the will, and the relations the testator bore to these three persons as that disclosed by the evidence and a reference to the will of 1885, that he did intend them to be the final recipients of his estate. (3 R. S. [6th ed.] 165; *Hope v. Brewer*, 48 N. Y. S. R. 834.) Testator intended to dispose of all his residuary estate. (*Wolfe v. Van Nostrand*, 2 N. Y. 436; *West v. Lawday*, 11 Clark, 375; *Smyth v. Smyth*, L. R. [8 Ch. Div.] 561; *Dobson v. Bowness*, L. R. [5 Eq.] 204; *Phillips v. Beal*, 25 Beav. 25; *Hodgson v. Jex*, L. R. [2 Ch. Div.] 122; *King v. George*, L. R. [4 Ch. Div.] 435; *Schult v. Moll*, 132 N. Y. 122; *Dean v. Gibson*, L. R. [3 Eq.] 713; *Ellis v. Selby*, 7 Sim. 364; *Wales v. Templeton*, 83 Mich. 177; *Riker v. Cornwall*, 113 N. Y. 115-127; *Lamb v. Lamb*, 131 id. 227-235; *Roe v. Vingut*, 117 id. 204-212; *Kerr v. Dougherty*, 79 id. 328-349; *Stimson v. Vrooman*, 99 id. 74-79; *Wager v. Wager*, 96 id. 164; *Blinen v. Seymour*, 88 id. 469; *Terpening v. Skinner*, 29 id. 505; *Taggart v. Murray*, 53 id. 233; *Van Vechten v. Keator*, 63 id. 52.) The testator, by the language first employed in the fourteenth paragraph of his will, clearly expressed his purpose to be to give, devise and bequeath all of his estate, both real and personal, and the persons are named to whom he made the devise and bequest.

(*Dean v. Gibson*, L. R. [3 Eq.] 717; *Lamb v. Eames*, 10 id. 667-672; *Clark v. Leupp*, 88 N. Y. 231; *Wales v. Templeton*, 83 Mich. 177-179; *Thornhill v. Hall*, 2 C. & F. 22-36; *Austin v. Oakes*, 117 N. Y. 577-598; *Roseboom v. Roseboom*, 81 id. 356-359; *Viele v. Keeler*, 129 N. Y. 198, 199; *Patterson v. Patterson*, 17 Beav. 210.) The intention of the testator to dispose of the entire residue of the estate by the use of this language also appears from its comparison with the will of 1885, which may be referred to and considered for this purpose. (*Ennis v. Smith*, 14 How. [U. S.] 400, 420, 421.) It was claimed on the argument in the Surrogate's Court that there were certain earnings, or income, of the estate not in any event disposed of by the will, and that the contestants should be adjudged entitled to that. But whether the gift of the residue took effect on the decease of the testator or of his widow, the result will be the same, and whatever such earnings or income may be, they will incidentally pass to the devisees and owners of the property from which that may issue or arise. (*In re Crossman*, 113 N. Y. 503; *Cochrane v. Schell*, 140 id. 516.)

GRAY, J. The will of the deceased was written by himself and made the following provisions: First, he gave to his wife, in lieu of dower and all claims by her as widow, absolutely, the sum of \$20,000 and, also, during her life the use of a similar sum and the use of all lands owned by him in the town of Friendship. He gave to her all his "household goods, furniture and fixtures and effects and all his horses, harnesses, carriages, robes and cutters." Second, he gave to each of these respondents the sum of \$10,000, less any indebtedness or notes held against them. Third, he gave to a niece the interest on \$4,000 during her life. Fourth, he gave to a church the sum of \$3,000, with directions as to its investment and use, and providing that if the church should be without a pastor for the term of twenty-two months the sum given should "revert to and be a part of his residuary estate." In the fifth, sixth, seventh, eighth, ninth and tenth clauses he

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made bequests for educational and charitable objects. In the eleventh clause certain specific articles were bequeathed. In the twelfth clause, he directed his executors to sell and convey any and all of his real estate, not otherwise disposed of, and to convert the same into personal estate; and he instructed them, in the event of the bequest before mentioned to the church failing, that it should become a part of his residuary estate. In the thirteenth clause, he directed that "after the aforementioned payments shall be made out of the avails of my real and personal estate the balance shall form a part of my residuary estate." The fourteenth clause reads as follows: "All the rest and residue of my estate both real and personal not heretofore disposed of I give bequeath and devise as follows all of my household goods furniture and effects after the decease of myself and wife to Kate M. Wellman Myra E. Corbin and Ella Lockwood to be equally divided between them share and share alike." It is contended on the part of the appellants, who are next of kin to the testator, that he died intestate as to the general residue of his estate. While, on the other hand, the respondents, who are the three persons named in the residuary clause of the will, claim that its provisions give to them whatever belongs to the residuary estate.

The peculiarity of the fourteenth, or residuary, clause, which creates the difficulty in this case, is that the general gift of the residuary estate, with which the clause commences, has an appearance of being restricted and narrowed, so as to limit the interest of the persons named therein to the testator's "household goods, furniture and effects." It is argued that the effect of writing in after the general gift of the residuary estate these words, viz.: "as follows all my household goods furniture and effects after the decease of myself and wife to Kate M. Wellman," &c., was to convert the residuary gift into a specific one of the particular property mentioned. The appellants say that the words of this clause, which precede the enumeration of the testator's household goods, furniture and effects, do not amount to a gift, as no donee is named in them,

and that they are not connected with, but are separate from, the names of the three persons below, by the expression "as follows" and the other intervening words and, that being the case, the name of a donee cannot be supplied by parol. The result is, according to their argument, that, while the opening words of the clause express an intention to proceed to give the residuary estate, the intention is unexecuted, except by what follows and that which follows is a specific gift of the remainder in the household goods, &c., expectant on the death of the testator's wife.

It cannot be disputed but that the testator, in undertaking to draw his own will, has expressed himself in the residuary clause, which, in view of the large estate of which he died seized, was the most important one in his will, in very inartificial and inapt language. I think that this is a case where the intention of the testator to effectually dispose of his residuary estate has very nearly failed of expression; but, with all the difficulties in the way, I think that the language of the clause is adequate to support the construction, which finds the necessary expression of the intention. If some effort is necessary to that end, it is one which it is the duty of the court to make, rather than to permit the result of a substantial intestacy. When we consider carefully the general plan of this will and the circumstances under which it was made, I think we can readily reach the conclusion that it is a case, not where the intention is really unexpressed, nor one where we have to add words to the will, or to supply its omissions, in order to find the intention expressed; but one where the words of gift in the residuary clause were merely inaptly used, or, rather, unfortunately arranged by the testator, and that we should be doing no violence to the rules of law, or of language, if we give that effect to the residuary clause, which the court gave below. If we can see that the inapt, or careless, use of language by the testator has created the difficulty in ascertaining his intention, but, nevertheless, feel certain as to what he meant, from reading the whole instrument in connection with the clause in question, we may subordinate the

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language to that meaning. I fully agree with the proposition, advanced for the appellants by their able counsel, that we must gather the intention of the testator from the words he has used and that it must not be a matter of conjecture or speculation on the part of the court. If it were not possible, in the will before us, to reach, with a certainty of conviction, the real intention of the testator and to find it actually expressed, I could not advise the affirmance of this judgment. But I think the testator has said enough to indicate his intention with respect to his residuary estate and its disposition by gift to the persons named. Unless a residuary bequest is circumscribed by clear expressions and the title of a residuary legatee is narrowed by words of unmistakable import, it will be construed to perform the office that it was intended for, viz.: the disposition of all the testator's estate, which remains after effectuating the previous provisions in the will, or which may be added to by lapses, invalid dispositions, or other accident. (*Riker v. Cornwell*, 113 N. Y. 115.) The rule of construction requires of the court, in dealing with the language of a residuary gift which is ambiguous, that it should lean in favor of a broad rather than of a restricted construction; for thereby "intestacy is prevented, which, it is reasonable to suppose, testators do not contemplate." (*Lamb v. Lamb*, 131 N. Y. 227.) In performing the office of construction, and in order that an apparent intention of the testator shall not be rendered abortive by his inapt use of language, the court may reject words and limitations, supply them, or transpose them, to get at the correct meaning. (*Phillips v. Davies*, 92 N. Y. 199.)

Turning to the will and the circumstances under which it was made, we find the testator to have been an active business man, who died at an advanced age; but who, up to the end, was in good health and attending daily to his business pursuits. He had no children and had taken the three persons named in the residuary clause of his will into his family at early ages. Although he never formally adopted them, they grew up and were recognized as members of his family and

the relations between them were at all times of an affectionate nature. The relations between him and his brothers and nephews and nieces were, also, of a more or less affectionate and pleasant nature. The ties of affection between him and the three women, who had grown up from childhood as members of his household, must have been strong enough to warrant him in feeling towards them as a parent might towards his children, when making testamentary disposition of his property. I refer to these circumstances, not so much because they were essential to be shown in aid of the construction of this will, but as tending to reinforce the apparent intention to make them residuary legatees. The general plan of the will itself shows that the testator had in mind to constitute a residuary fund, which might be swelled in its proportions by events affecting prior bequests. For instance, in the sixth clause of the will there is the provision that, if the bequest to the church should fail, it should become a part of his residuary estate. A similar provision again appears in the twelfth clause of the will. In the thirteenth clause he provides that the balance remaining after payment of legacies shall form a part of his residuary estate. We then have the fourteenth, or residuary, clause in question; the very existence of which indicates a purpose on the part of the testator to make a disposition of his residuary estate and, unless there is something prohibitive, or insuperably defective in it, the presumption should justly obtain from its presence, as also from the very plan of the will, that an effectual disposition had been made of whatever constituted the testator's residuary estate. Having made certain bequests of his property and having provided with reference to a residuary estate, the testator proceeds to say what shall be done with it and his language is "all the rest and residue of my estate both real and personal not heretofore disposed of I give, bequeath and devise as follows," &c. That language certainly is explicit and general enough to carry whatever composed his residuary estate to the donees named; and were it not for the words which intervene between that general gift

and the names of the donees there could, of course, be no doubt with respect to their rights. But is it true that the doubt which is raised is other than superficial and that it is not removable upon some consideration of the matter? Shall we give the effect to the words "as follows," which shall restrict and cut down the general gift of the testator's estate to the specific articles mentioned and which are of comparatively small value? Is there any reason for supposing that the testator did not mean, in making the general gift of his residuary estate, that the three women named in that clause should not receive it? Can we justly say that, having in his will anticipated the existence of a residuary estate and then having expressed the intention to give it, that he has left the intention unexecuted for failure to name donees? I think not and I think that we should hold that the general words of gift carried to the three women, named as residuary legatees, all of the residuary estate; notwithstanding the presence of the qualifying words "as follows." The testator was mindful, when drawing the fourteenth clause, of the former provision in his will made in favor of his wife; which, apparently, gave absolutely to her the household goods, furniture and effects. Intending, doubtless, that her enjoyment of them should only be for her life, he, parenthetically, to use the expression of the respondent's counsel, effects that limitation upon his previous gift, by interjecting, in the general gift of the residuary estate to the legatees named, the words in question and which have caused the difficulty here. Having completed his will, it is evident that, out of abundant caution and because he believed it to be necessary, he inserted these words of limitation which would represent his purpose and create a life use in the specific effects mentioned.

This construction of the fourteenth clause seems to us, in every view of the matter, not only the just one to make, but the reasonable and necessary one upon the very language of the clause, read in connection with the general scheme of the will. I may, also, observe that the absence of all punctuation leaves us at greater liberty to make that arrangement of

the words, parenthetical or otherwise, which will subserve the apparent purpose of the testator.

Counsel for the respondent cites us to several cases in the English courts, which show that a general and comprehensive testamentary gift of property will not be cut down by the enumeration of particular items. In *Fisher v. Hepburn* (14 Beav. 626), the will gave "the rest, residue and remainder of my estate and effects, whatsoever and wheresoever;" and the gift was held not to be restricted by the enumeration, immediately following, of "canal shares, plate, linen, china and furniture." In *King v. George* (L. R. 4 Ch. Div. 435), the testatrix bequeathed "to A. K. George all that I have power over, namely, plate, linen, china, pictures, jewelry, lace, the half of all valued to be given to Herbert George, son of Frederick George." Vice-Chancellor MALINS held that the bequest was not limited to the articles specifically bequeathed and he uses this language: "I cannot help thinking that the doctrine has been settled that where a testator gives his property generally by the words 'all my property,' or 'all my estate,' or 'all that I have power over,' as in this case where he uses words sufficient to pass everything, and then proceeds to enumerate particulars, — it is now, I think, pretty well settled that an enumeration of particulars does not abridge or cut down the effect of the general words." The appellants' counsel seeks to distinguish the decision in *Fisher v. Hepburn* by the suggestion that, as the articles there were named in immediate connection with the gift of the rest and residue, their enumeration could not be regarded as an attempt to limit the gift to them; and in *King v. George* he suggests the distinction that an intent to give the entire residue to the legatee named was unequivocally expressed by words of direct gift of the residue to such donee, before the enumerating words were resorted to. I am inclined to think, however, that the distinctions suggested are not substantial; for we have in the clause of the will before us an absolute gift of all the rest and residue of the testator's estate, which is made to persons named therein; unless we



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allow to the words "as follows" the restrictive effect insisted upon by the appellants. In the case of *Childs v. Wilson* (2 Jur. 415), to which we are referred by the appellants' counsel, in his argument upon the effect of the expression "as follows," there was no general residuary gift. In that case the word "namely" followed after a gift of all the testator's household furniture to his wife and after the gift to trustees for his wife and child of all his "money, goods and chattels whatsoever, except my household furniture aforesaid;" and because, after "namely," he proceeded to give to his wife fifty pounds a year for her life and to his daughter five hundred pounds when she attained twenty-one "and in case my wife, Mary Brown, shall be pregnant at my death, the child to have five hundred pounds and my wife twenty-five pounds per annum, instead of fifty pounds as aforesaid," it was held that there was an intestacy as to the rest of the estate not comprehended within those amounts. But there was some reason in that case for attaching to the word "namely" the restricted meaning, because the bequests were in fact restricted by naming precise amounts.

Without further discussion of the great number of cases, which have been cited as bearing more or less upon the question here, I think we are warranted in giving that construction to the residuary gift, contained in the fourteenth clause of this will, which will be in harmony with the plan of the whole will and which will effectuate that evident intention, which the words of the clause suggest and which we think they have, although most inartificially, expressed. As I have previously suggested, the case presents no inconsiderable difficulty, growing out of the fact that the testator has undertaken to make his own will and, in doing so, has been unfortunate in the arrangement of words. But the result of a consideration of the whole will leaves the conviction that the testator has not failed to express his intention to give the whole of his residuary estate to the three persons named.

The proponents of this will offered extrinsic evidence to show the motives and the intention of the testator; which con-

sisted in the introduction of a will, made by him some few years previous to the present will, and in considerable testimony as to the relations which subsisted between the testator and the respondents. It may be a matter of doubt as to the relevancy and materiality of very much of this evidence; inasmuch as the language of the will was not, perhaps, sufficiently ambiguous to warrant it. The object, of course, of introducing the testimony with respect to the relations subsisting between the testator and the respondents, was to place the court, as nearly as possible, in the position of the testator when he made his will; and that evidence to that effect is generally admissible cannot be denied. It may be that as to some of the evidence here it exceeded the proper limits; but no prejudice has resulted and without it the court could have arrived at the conclusion it did. As to the previous will which was introduced in evidence, the object was to show that the same persons were intended to be benefited by the present will, who were the principal beneficiaries in the prior will. It is sufficiently plain from a comparison of the two wills and the literal identity of their language in important provisions, that the prior will must have been before the testator and furnished the model for drawing the present will. In that view of the case, perhaps, it cannot be said that there was error in receiving in evidence the former will to aid in the construction of the present one. But, whatever doubt there may be as to the admissibility of such evidence, and, in my opinion, there is considerable, it did not constitute error which calls for a reversal at our hands; for the reason that, in its absence, the same result must have been reached. Under the provisions of section 2545 of the Code of Civil Procedure, a surrogate's decree shall not be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby. The effect of that section is to leave the appellate court at liberty to disregard the error, if it could have had no influence upon the determination of the case. If the judgment is clearly right,

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notwithstanding the error, it is no ground for reversal. (*Loder v. Whelpley*, 111 N. Y. 239, 246.)

It results from the views which I have expressed, that the judgment below should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

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MARIE SCHUTZ, Respondent, v. JOSEPH MORETTE, Sole Executor, etc., Appellant.

A cause of action upon an account stated does not rest upon the obligation originally created when the items of indebtedness arose, but upon the agreement of the parties, made after the transactions constituting the account, that a certain balance remains due from one to the other, and the promise of the former to pay this balance; and so, it is unnecessary in an action upon an account stated to set forth in the complaint the subject-matter of the original debt.

*It seems*, that mere silence upon the part of an executor, to whom a claim against the estate he represents has been presented, may not be regarded as an admission of the claim, and so relieve the claimant from establishing it in the usual way, or put upon the estate the burden of affirmatively establishing mistake or error.

An executor can neither by his promise or acknowledgment, oral or written, revive a debt against the estate of his testator barred by the Statute of Limitations.

An acknowledgment of a debt by an executor will not, in the absence of an express promise to pay, take the case out of the statute.

The complaint in an action against an executor alleged, in substance, that plaintiff presented a duly verified claim, which was set forth in full, against the decedent's estate, to defendant, who acknowledged its receipt, and although he has had a reasonable opportunity to examine into its validity and fairness he has not disputed or rejected the same, but refuses to pay it. The claim on its face, in connection with other facts averred in the complaint, showed presumptively that a part at least was barred by the Statute of Limitations at the time of the death of the testatrix. Upon demurrer to the complaint, *held*, that it did not state a cause of action.

*Schutz v. Morette* (81 Hun, 518), reversed.

(Argued April 10, 1895; decided May 21, 1895.)

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 19, 1894, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term overruling a demurrer to the complaint.

The complaint in this action in substance alleged that Margaretha Metzger died leaving a will which was duly proved in the county of New York, where she resided, and that letters testamentary were issued to the defendant, Joseph Morette; that on or about December 5, 1892, said defendant caused notice to creditors to be published to present their claims on or before June 5, 1893; that on November 18, 1892, plaintiff presented to defendant a duly verified claim and that defendant acknowledged the receipt thereof; that said claim was as follows, viz.:

"CITY AND COUNTY OF NEW YORK, ss.:

"Marie Schutz, being duly sworn, says that she resides at No. 236 Sixth avenue, in the city of New York, and has a claim for the sum of one thousand dollars (\$1,000) against the estate of Margaret Metzger, deceased, formerly a resident of No. 238 Sixth avenue, which she hereby presents to the executor of the will of said testatrix and demands payment thereof, the said claim growing out of the following facts, to-wit:

"At New York city and at the city of Saratoga, in the state of New York, this deponent rendered services to the said testatrix at her request, for which she promised and agreed to pay, which said services were so rendered to her at different times during a period of eight years last past, consisting of nursing and attendance both by day and at night, and the said services were fairly and reasonably worth the sum of one thousand (\$1,000) dollars, no part of which has been paid.

"M. SCHUTZ.

"Sworn to before me this 16th }  
day of April, 1894. }

"FRANCIS W. JUDGE, JR.,

"Notary Public, N. Y. Co."

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It was then alleged that although said defendant has had a reasonable opportunity for examination into the validity and fairness of the claim so presented, he has not disputed or rejected the same, and refuses to pay the same, or any part thereof.

Judgment was demanded against the defendant for the sum of \$1,000, with interest thereon from February 1, 1892, besides costs.

The complaint was demurred to as not stating facts sufficient to constitute a cause of action.

*John S. Davenport* for appellant. Admitting that the theory of the decision is sound, to wit, than an executor's silence as to a claim presented to him is irrevocable and in itself constitutes a cause of action, the complaint is still demurrable for failure to allege such allowance or admission. (*Emory v. Pease*, 20 N. Y. 62; 2 Chitty Pl. 90; *Lent v. N. Y. & M. R. R. Co.*, 130 N. Y. 504.) The statement of claim as presented to the executor, and set out in full in the complaint, is sufficient to raise the question decided on this demurrer, *i. e.*, whether an undisputed claim must be deemed admitted irrevocably. (Code Civ. Pro. § 2718; *Bullin v. Johnson*, 111 N. Y. 204.) This action is against the executor in his representative capacity and the judgment binds the assets of the estate. The effect of the decision of the General Term is that if the executor was silent as to the claim, no defense can now be offered. (*Glaucer v. Fogel*, 88 N. Y. 434; *In re Strickland*, 1 Conn. 435; *Lockwood v. Thorn*, 11 N. Y. 170.) The theory of the statutory arrangements for the winding up of estates does not require any such rule as is claimed in this case. (Code Civ. Pro. § 2718; *In re Whitney*, 39 N. Y. S. R. 899; *Butler v. Johnson*, 111 N. Y. 204.)

*J. George Flammer* for respondent. A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. (*Marie v. Garrison*, 83 N. Y. 14.)

An unrejected claim acquires the character of a liquidated and undisputed debt against an estate. (*Lambert v. Craft*, 98 N. Y. 342; Code Civ. Pro. § 1822; *Hoyt v. Bennett*, 50 N. Y. 538; 32 Hun, 466; 98 id. 342.) Production of vouchers, verification of claim or presentation of affidavit of the claimant, stating what is justly due, that no payment has been made thereon and that there are no offsets against the same, is needless unless exacted by the executor. (Code Civ. Pro. § 2718; *Gansevoort v. Nelson*, 6 Hill, 389; *Budd v. Walker*, 29 Hun, 344.) The acquiescence of the parties must depend upon the special circumstances of each case in general. When a party indebted upon an account receives and retains it beyond such time as is reasonable under the circumstances, and according to the usage of the business, for examining and returning it, without communicating any objections, he is considered to acquiesce in its correctness, and he becomes bound by it as an account stated. Signature to the account or express admission is not necessary. (*Knickerbocker v. Gould*, 115 N. Y. 533; *Lockwood v. Thorne*, 18 id. 285; *Champion v. Joslyn*, 44 id. 653; *Stenton v. Jerome*, 54 id. 480; *Quincy v. White*, 63 id. 370; *Guernsey v. Rexford*, Id. 631.)

ANDREWS, Ch. J. The authorities establish that an executor or administrator may state an account of dealings of the testator or intestate, and that an action or an *insimul computassent* may be maintained against him in his representative character to recover a claim ascertained and adjusted on such accounting. (*Segar v. Atkinson*, 1 H. Bl. 103; *Ashby v. Ashby*, 7 B. & C. 444.) When the account relates to transactions between the executor or administrator and another party, upon claims not existing at the death of the decedent, although they grow out of matters connected with administration, the action lies only against the executor or administrator personally. In the one case the judgment is *de bonis testatoris*, and in the other *de bonis propriis*. (*Reynolds v. Reynolds*, 3 Wend. 244; *Gillet v. Hutchinson's Admrs.*, 24

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id. 184.) The complaint is not demurrable, therefore, on the ground that an action on an account stated will not lie against an executor in his representative character upon an accounting between him and the plaintiff. It is important, however, in determining whether the complaint states a cause of action upon an account stated, to consider the essential characteristics of that liability. The cause of action in such case is not the obligation originally created when the items of indebtedness arose. It is the agreement of the parties made after the transactions constituting the account, that a certain balance remains due from the one to the other, and a promise of the party found to be indebted to pay to the other the sum so ascertained, and in suing in this form of action it is unnecessary for the plaintiff to set forth the subject-matter of the original debt. (1 Ch. Pld. 358.) The doctrine of account stated, and the remedy thereon, is said to have been founded originally on the practice of merchants (*Sherman v. Sherman*, 2 Vern. 276), but its scope has been extended so as to embrace an account with items on one side only, and when the transaction has no relation to trade and there were no mutual dealings. The stating of an account is in the nature of a new promise. (*Holmes v. D'Camp*, 1 Jo. 34.) The complaint in this action neither avers that an accounting has been had between the parties in respect of the alleged debt set forth in the verified claim presented to the defendant, nor that any balance was ascertained or found to be due from the testatrix to the plaintiff, nor that the defendant had promised to pay any amount whatever, nor are there any averments of equivalent import. (See form of count, 2 Ch. Pld. 90.) These essential facts are left to be inferred from the allegations that the verified claim set forth had been presented to the defendant pursuant to notice, and that, although a reasonable opportunity for examination into its validity was had, the executor had not disputed or rejected it. The complaint is based upon the assumption that an omission by an executor to reject or dispute a claim presented to him against the estate he represents, pursuant to notice, justifies an

inference of all the facts which are essential to constitute a cause of action on an account stated. It is true that under the present system of pleading a complaint on demurrer is deemed to allege what can be implied by reasonable intentment from the allegations therein. (*Marie v. Garrison*, 83 N. Y. 14.) But this does not, we conceive, help the plaintiff. The doctrine that an account rendered becomes an account stated after the lapse of a reasonable time for examination by the party against whom it is rendered, and he makes no objection, is, in general, founded upon a just inference that a party against whom a claim is made will dispute it, if incorrect or unfounded. His silence operates as an admission of the correctness of the account and *prima facie* establishes the claim in favor of the party presenting it. (*Lockwood v. Thorne*, 18 N. Y. 285.) But the doctrine has, from the nature of the case, a much more restricted application when the plaintiff relies upon the silence of an executor to whom a claim against the estate he represents has been presented. He is not presumed to be personally cognizant of the transactions out of which the claim arose. It would subject the estates of decedents to great danger if mere silence of the executor should be regarded as an admission of a claim presented, and relieve the claimant from establishing it in the ordinary way, and put upon the estate the burden of affirmatively establishing mistake or error. The office of executor or administrator is one exceedingly necessary and useful, and must, in frequent instances, be assumed by persons unskilled in legal matters, and to infer from mere silence on the part of the executor or administrator an agreement that the claim was just and a promise to pay it would often contradict the real intention and tend to subject estates of decedents to the payment of unfounded claims.

In the present case, even if the general rule was applicable, the nature of the claim presented to the executor rebuts any inference of assent by the executor to its correctness, arising from mere silence, and prevents any implication from such silence of a promise on his part to pay the claim presented.



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The claim on its face, in connection with other facts averred in the complaint, shows presumptively that in part, at least (and for all that appears it may be the greater part), was barred by the Statute of Limitations at the death of the testatrix. An executor can neither by his promise or acknowledgment, oral or written, revive a debt against the estate of his testator barred by the Statute of Limitations (*Bloodgood v. Bruen*, 8 N. Y. 362), and against a claim so barred he is bound to plead the statute. (*Butler v. Johnson*, 111 N. Y. 204.) In view of the power and duty of an executor or administrator, the inference from his silence merely of an agreement on his part to pay a debt so situated, would be unreasonable. The implication of such a promise would place him in the position of agreeing to do what would be a plain violation of his official duty. It was held in *Young, Admr., v. Hill* (67 N. Y. 163), which was a claim in part to recover compound interest based on an account stated, that if from the account rendered "it appears that any of the charges are not in law or equity proper claims, no promise to pay a balance into which they enter can be implied." It is no answer to the point that the executor when sued would not be precluded from pleading the statute. The question is whether assent of the executor to the correctness of the account and a promise to pay the claim as presented, can be implied from its presentation and retention, and his subsequent silence. We think no such implication is permissible. It has been held in many cases that an acknowledgment of a debt by an executor or administrator, in the absence of an express promise to pay, will not take a case out of the Statute of Limitations. Where a debtor is sued for his own debt the law infers from an acknowledgment a promise to pay, upon which an action lies. But in case of an executor or administrator the promise must be express, and will not be implied from an acknowledgment merely. (*Tullock v. Dunn*, Ry. & Mood. 416; *Thompson v. Peter*, 12 Wheat. 565; *Fritz v. Thomas*, 1 Whart. 66; Angell on Lim. sec. 261 *et seq.*) In the present case no express promise is averred, but the pleader leaves it to

be inferred that the debt was settled and adjusted and a promise was made to pay by the executor, from his inaction merely, and this although it presumptively appears that a portion of the claim presented was unenforceable by reason of the statute. The statutory system for the presentation and adjustment of claims against the estate of a decedent furnishes a summary and inexpensive method by which claims can be adjusted without action, or by reference. The executor or administrator may, on being satisfied of the justice of a claim presented, admit it, or, if he doubts its justness, may reject it and leave the creditor to his remedy by action if a reference is not agreed upon. But the presentation of a claim, followed by inaction, the executor or administrator neither admitting nor rejecting it, does not, we think, bind the estate as upon an account stated. It may be justly claimed that the executor or administrator ought, in the fair discharge of his duty both to the creditor and to the estate, to examine the claim within a reasonable time and make known his position in respect to it. But it would be hazardous, in view of the ignorance or inexperience of the persons called upon to act as executors or administrators, to construe mere silence on his part as an admission that the claim was a valid one. The creditor must see to it that the claim is admitted and allowed by the executor or administrator, and an implied admission from silence is not sufficient. In *Reynolds, Admr., v. Collins* (3 Hill, 36) it was held that the presentation of a claim under the statute does not bar the running of the Statute of Limitations, and if the executor neither allows nor rejects it, the creditor "must take care to have the matter adjusted or commence his action within the period of the statute or he will be too late."

We think the demurrer to the complaint was well taken and the judgments below should be reversed, with costs, with leave to the plaintiff to amend her complaint if so advised.

All concur.

Judgments reversed.

THE NEW YORK AND BROOKLYN FERRY COMPANY, Appellant,  
 v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY  
 OF NEW YORK, Respondent.

In 1867 defendant granted to plaintiff the right to operate a ferry, and executed to it a lease of certain slips and bulkheads for the term of ten years, by the terms of which plaintiff was to erect the necessary ferry fixtures and to yield them up to defendant at the end of the term, subject, however, to the right reserved to such a lessee by the provision of the city charter of 1857 (§ 41, chap. 446, Laws of 1857), requiring all persons acquiring any ferry lease to purchase at a fair valuation the boats, buildings and other property of a former lessee necessary for the purposes of such ferry grant. Subsequently, by agreement between the parties, plaintiff surrendered the premises covered by the lease and accepted in lieu thereof a lease of other premises for the balance of the original term; in and by which defendant covenanted that in case a new lease should not be granted to plaintiff, defendant would pay for the buildings and ferry fixtures erected by plaintiff on the demised premises, "in the manner provided for in and by the said first-mentioned recited indenture or lease." At the termination of this lease plaintiff demanded a renewal at the same rental, which defendant refused, and a lease was executed to another ferry company at an increased rental. In an action upon said covenant to recover the value of the buildings and ferry fixtures erected by plaintiff, *held*, that the rights of the parties were not affected by the revised charter of 1870 (Chap. 187, Laws of 1870), and that defendant was under no obligation to renew the lease at the same rental as provided for by the old lease.

It appeared that the ferry company to whom the new lease was executed was organized by plaintiff's officers for its benefit and that of its stockholders. *Held*, that in effect the new lease was issued to plaintiff, it having become its own successor under a new name; and so, it had no cause of action.

(Argued April 25, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14, 1894, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*John M. Scribner* for appellant. The defendant has no right to interpose, as a defense, want of authority in its officers to make the contract in question. (*W. A. Co. v. Barlow*, 63 N. Y. 62, 70; *R. W. Co. v. McCarthy*, 6 Otto, 267; *Woodruff v. E. R. Co.*, 93 N. Y. 619; *A. S. Bank v. Savery*, 82 id. 307; *R. L. R. Co. v. Roach*, 97 id. 381; *In re McGraw*, 111 id. 106; *Mayor, etc., v. Huntington*, 114 id. 631, 634; *H. & G. M. Co. v. H. & W. M. Co.*, 127 id. 252, 260; *City of Buffalo v. Balcom*, 134 id. 532, 536; *Linkhauf v. Lombard*, 137 id. 417, 423; *Mayor, etc., v. Sonneborn*, 113 id. 425, 426.) The commissioners of the sinking fund had power and authority under the law to make the agreement of February 13, 1871, and the lease of April 4, 1871. (Laws of 1869, chap. 876, § 8; *Mayor, etc., v. Sonneborn*, 113 N. Y. 425; *In re Mayer*, 50 id. 504, 506; *People v. Briggs*, Id. 553; *Conner v. Mayor, etc.*, 5 id. 285; *S. M. Ins. Co. v. Mayor, etc.*, 8 id. 241; *People v. McCann*, 16 id. 58; *Brewster v. City of Syracuse*, 19 id. 116; *In re Volkening*, 52 id. 650; *Sullivan v. Mayor, etc.*, 53 id. 652; *In re Van Antwerp*, 56 id. 261; *People v. Dudley*, 58 id. 323; *People v. Quigg*, 59 id. 83; *Harris v. People*, Id. 601; *Werzler v. People*, 58 id. 525; *Devlin v. Mayor, etc.*, 63 id. 8; *In re P. P. & C. I. R. R. Co.*, 67 id. 373; *People v. Banks*, Id. 568; *Gloversville v. Howell*, 70 id. 289; *In re Sackett St.*, 74 id. 95; *People ex rel. v. Livingston*, 79 id. 279; *Sweet v. B., etc., R. R. Co.*, Id. 293; *Tift v. City of Buffalo*, 82 id. 204; *Lewenthal v. Mayor, etc.*, 61 Barb. 511; *Sweet v. City of Syracuse*, 129 N. Y. 331, 332; *Curtin v. Barton*, 139 id. 513; *In re Mayor, etc.*, 99 id. 576, 577; *In re Knaust*, 101 id. 194; *Bd. Water Comrs. v. Dwight*, 101 id. 11; *Cole v. State*, 102 id. 58; *W. I. B. Co. v. Town of Attica*, 119 id. 210; *Astor v. A. R. Co.*, 113 id. 109, 110; *Van Brunt v. Town of Flatbush*, 128 id. 54, 55; *N. I. B. Co. v. Attica*, 49 Hun, 517; *Gaston v. Meek*, 42 N. Y. 186; *People v. Bd. Suprs.*, 43 id. 10; *Huber v. People*, 49 id. 132; *Newell v. People*, 7 id. 97; *Quinn v. Mayor, etc.*, 63 Barb. 601.) At the times when the agreement of February 13, 1871, and the

lease of April 4, 1871, were made the commissioners of the dock department had no authority over the subject. (Laws of 1870, chap. 137, § 99; Laws of 1871, chap. 574, § 6.) The court erred in charging the jury that defendant was entitled to recover the value of the use and occupation of the demised premises for the period from November 1, 1877, to June 14, 1878, and plaintiff's exception was well taken. (*McFarlan v. Watson*, 3 N. Y. 288; *Jennings v. Alexander*, 1 Hilt. 154; *Sylvester v. Ralston*, 31 Barb. 286; *Thompson v. Bower*, 60 id. 463; *Preston v. Hawley*, 101 N. Y. 588; *Collyer v. Collyer*, 113 id. 446.)

*James C. Carter* for respondents. The lease containing the covenant upon which the action was brought, as well as the covenants on the part of the city of New York in the quadrupartite agreement of February 13, 1871, have the sanction only of the commissioners of the sinking fund. Neither of these covenants has any validity unless these officials were authorized by law to bind the city to such engagements. (Laws of 1857, p. 886, § 38.) No other authority to make the covenant sued upon can be asserted for these commissioners, except such as may be contained in section 8 of chapter 876 of the Laws of 1869 (Vol. 2, p. 2132). The provisions of this section are unconstitutional and void, because contained in a local act relating to another subject and not expressed in the title. (*In re Astor*, 50 N. Y. 366; *In re Mayor*, Id. 504; *People ex rel. v. Briggs*, Id. 553; *S. M. Ins. Co. v. Mayor, etc.*, 8 id. 241; *Huber v. People*, 49 id. 132; *Gaskin v. Meek*, 42 id. 186; *People v. Allen*, Id. 404.) If the commissioners did thus acquire authority to make the covenant in question, it was only by way of incident to the power to make leases; and this power, with all its incidents, they lost, before the execution of the lease or of the quadrupartite agreement on which it was based. (*Mayor, etc., v. N. Y. & S. I. F. Co.*, 8 J. & S. 232.) If the 8th section of the act of 1869 were valid and unaffected by subsequent legislation, it would not be sufficient for the plaintiffs. It gives, indeed, the power

to lease, but nothing more. It falls far short of conferring authority to bind the city to the covenant which forms the basis of this suit. (Laws of 1857, p. 888, §§ 37, 38, 41; *Nixon v. Hyserott*, 5 Johns. 58; *Dillon on Mun. Corp.* § 445.) There is still another fatal objection to this action. Whoever has the burden of satisfying a judicial tribunal concerning the meaning of this vague covenant must fail. It is void for uncertainty. (*Mayor, etc., v. N. Y. & S. I. F. Co.*, 8 J. & S. 232.)

HAIGHT, J. This action was brought to recover the value of certain buildings and ferry fixtures erected by the plaintiff at the foot of Roosevelt street, in the city of New York.

It appears that on the 26th day of November, 1867, the defendant granted to the plaintiff the right to operate a ferry across the East river from the foot of Roosevelt street to South Seventh street, in the city of Brooklyn, together with a lease of certain slips and bulkheads for the term of ten years, or until November first, 1877, at the annual rental of \$4,900; that in and by the terms of the lease the plaintiff at its own proper cost and charges was to build and erect necessary bridges, floats and other fixtures at each landing place of the ferry and to keep the same in repair, together with the necessary docks and piers, and at the termination of the lease to surrender and yield up the said ferry, together with the bulkheads, piers, docks, floats, bridges, fixtures and improvements which may have been erected for the use of the ferry at the foot of Roosevelt street in good order and condition, subject, however, to the rights reserved to the plaintiff by the 41st section of the charter of 1857, the provisions of which are as follows: "All persons acquiring any ferry lease or other franchise or grant under the provisions of this act shall be required to purchase at a fair appraised valuation the boats, buildings and other property of the former lessees or grantees actually necessary for the purpose of such ferry grant or franchise."

It further appears that one John English also held a lease from the defendants of a pier in the East river adjoining that

leased to the plaintiff at the foot of Roosevelt street at an annual rental of \$1,500 per year, which he assigned to the plaintiff, who used the same in connection with the ferry rights acquired in and by the first-mentioned lease, and that in 1871 the New York and Brooklyn Bridge Company entered into negotiations with the plaintiff, defendant and one John L. Brown, who occupied adjoining premises, to acquire the lands so leased and held by the plaintiff, for the purpose of locating thereon the New York end of the bridge, which negotiations resulted in what is known as the quadrupartite agreement, in which the plaintiff agreed to release the premises occupied by it as a landing place for the ferry, and to accept in lieu thereof certain other premises adjoining, including those occupied by Brown, and for the purpose of effecting such change it was paid the sum of \$80,000 with which to construct buildings, bridges and other necessary ferry fixtures upon the abutting piers in the place of those existing upon the piers released to the bridge company. Pursuant to this agreement, and on the 4th day of April, 1871, the mayor, aldermen and commonalty of the city of New York, as party of the first part, made and executed to the plaintiff, as party of the second part, a lease of the premises described in the quadrupartite agreement, taken in place of those covered by the former lease for the unexpired term of that lease, at the annual rental of \$6,400. In and by this lease it was provided, "and the said party of the first part, for itself, its successors and assigns, covenants and agrees by these presents to and with the said party of the second part, its successors and assigns, that the buildings and ferry fixtures that shall be put upon the hereby-granted and demised premises shall be paid for by the said party of the first part, its successors and assigns, to the said party of the second part, its successors and assigns, if a new lease shall not be granted to the said party of the second part, its successors and assigns, in the manner provided for in and by the said first-mentioned recited indenture or lease." At the termination of this lease the plaintiff demanded from the officers of the city a renewal thereof at the same rental, which was

refused, and thereafter the ferry grant and lease was made to the New York Ferry Company for the term of five years at the annual rental of \$15,050 per year. This action was brought under the above-quoted covenant.

The first question presented for our determination is as to whether the plaintiff was entitled to a renewal of the lease at the same rental, or in default thereof to recover pay for the buildings and ferry fixtures constructed by it upon the premises referred to. This question involves a construction of the provision of the lease. Does the phrase "in the manner provided for in and by the said first-mentioned and recited indenture of lease" relate to the provision with reference to the new lease which immediately precedes it, or does it relate back to the provision with reference to the payment for the buildings and ferry fixtures? In answering this question we should look for the intention of the contracting parties as disclosed from the surrounding circumstances and the history of the transaction. By referring to the charter of 1857, we find that ferry rights were required to be let to the highest bidder for a term not to exceed ten years, and under it the only way in which the ferry company could have a renewal of its lease was by again becoming the highest bidder therefor. No agreement could, therefore, be entered into for a renewal at the same rental, but instead thereof we have the provisions of the 41st section in which the ferry company was awarded the fair appraised valuation of its buildings and fixtures, which was required to be paid for by the new lessees. These provisions were omitted by the revision of the charter in 1870 (Chap. 137), but we apprehend the rights of the parties remained unchanged, for the charter of 1857 and the provisions of section 41 were distinctly referred to and made a part of the lease of 1867. We thus have the policy of the city distinctly indicated. It was to grant rights to operate a ferry together with a lease of the necessary piers for landing purposes for a limited term of years to the highest bidder, leaving it to the lessee to construct and maintain the necessary buildings and ferry fixtures, undertaking, however,



that he shall be paid therefor the fair appraised value at the expiration of his lease by the persons or company succeeding thereto in case he should fail to acquire a new lease. We find nothing in the provisions of the revision of 1870 that indicates a change of policy in this regard. Chapter 876 of the Laws of 1869 was not repealed. By it the granting of ferry rights was transferred to another department of the city government; but nothing is found in the provisions of that act or of the new revision authorizing the city, or any of the officials thereof, to enter into the business of constructing buildings or ferry fixtures upon the piers or docks owned and controlled by it, or to continue leases at the same rental, rather such an idea would seem to be negatived by the fact that the statute still retains the provision prohibiting a lease for a longer term than ten years, thus leaving it in the hands of the officers then charged with the duty of letting to determine the amount that should be demanded and the conditions imposed. There is nothing in the provisions of the old lease specifying or providing the manner or conditions upon which a renewal lease should be given. There is, however, a provision relating to the manner in which the lessee shall be paid for his buildings and fixtures, from all of which we conclude that the phrase alluded to was intended to refer to the payment for the buildings and fixtures and not to the renewal of the lease. So construing the covenant, it follows that the defendant was under no obligation to renew the plaintiff's lease at the same rental paid under the old lease.

It remains to be seen whether a new lease was in effect issued to the plaintiff. This question was carefully tried and submitted to the jury, who found in favor of the defendant. Our reading of the appeal book leads us to conclude that this verdict is well sustained by the evidence. The new lease was issued to the New York Ferry Company, a corporation with a different name, but it was organized by the officers of the plaintiff evidently for its benefit and that of its stockholders and for the purpose of enabling the plaintiff to maintain this action. It consequently follows that as yet no breach of the

covenant sued upon has been shown. The plaintiff in effect became its own successor under a new name and as such has no cause of action for the buildings and fixtures in question during the lifetime of its new lease.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. \_\_\_\_\_

ALFRED JOHNSON, Respondent, v. STEAM GAUGE AND LANTERN  
COMPANY, Appellant.

In an action to recover damages for injuries sustained by plaintiff, an employee of defendant, alleged to have been caused by its negligent omission to construct a fire escape sufficient to meet the requirements of the act directing the construction of fire escapes on the outside of factories like that of the defendant (Chap. 409, Laws of 1886, as amended by chap. 462, Laws of 1887), these facts appeared: There was a door in the rear of the factory opening on the first floor; this was three feet above the court yard, and beneath this was an area giving access to the basement. To reach this door three steps leading to a platform in front of the door had originally been erected over the area, forming a covering to it. The platform and steps were supported by iron stanchions. There was a fire escape ladder directly over the platform, its lowest round ten feet above it. Prior to the fire this entrance to the factory had been closed and the steps leading to the platform, also, as plaintiff's evidence tended to show, one plank of the platform, had been removed for the purpose of putting in a chute running from the court yard to the bottom of the area, leaving the iron stanchions exposed and so much of the area uncovered. The evidence authorized a finding that the portion of the platform left was so narrow as to render it impossible for a person dropping vertically from the ladder to land upon it. The factory caught fire, and plaintiff, to escape from the burning building, went down the ladder, and when his feet were on the bottom round, became unconscious and dropped therefrom. When he recovered consciousness he found himself lying across the chute. The court charged that if plaintiff dropped upon the platform and was there injured he could not recover. *Held*, that the evidence justified a finding that plaintiff did not drop upon the platform, but upon the stanchions or chute; that the jury properly found defendant guilty of negligence in leaving the stanchions and chute in the condition they were and the area but partially covered by the narrow platform; and so, that it had failed to furnish a proper fire escape within the meaning of the statute.

Reported below, 72 Hun, 535.

(Argued April 29, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 20, 1893, which denied a motion by defendant for a new trial and ordered judgment in favor of plaintiff on a verdict.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of defendant.

The facts, so far as material, are stated in the opinion.

*Louis Marshall* for appellant. The burden of proof rested upon the plaintiff to establish that his injuries were occasioned solely by negligence of the defendant in maintaining the chute, and in the absence of proof indicating how his injury occurred there can be no presumption that it was occasioned by any neglect of duty on the part of the defendant; and the evidence fails to show actionable negligence. (*Tolman v. S. B. & N. Y. R. R. Co.*, 98 N. Y. 198; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 id. 330; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 248; *Bond v. Smith*, 113 id. 278; *Pauley v. S. G. & L. Co.*, 131 id. 97, 100; *Searles v. M. R. R. Co.*, 101 id. 661; *Taylor v. City of Yonkers*, 105 id. 209.) Assuming that the defendant was negligent because it maintained the chute near the bottom of the fire escapes, the evidence fails to indicate that its presence had any casual relation to Johnson's injury. (*Marble v. City of Worcester*, 3 Gray, 481; *Fogg v. Nahant*, 98 Mass. 478; *Healy v. Earle*, 30 N. Y. 208; *Pakalnischky v. N. Y. C. & H. R. R. R. Co.*, 83 id. 424; *Sheldon v. H. R. R. R. Co.*, 29 Barb. 226; *Morrison v. N. Y. C. & H. R. R. R. Co.*, 32 id. 668; *Harvey v. N. Y. C. & H. R. R. R. Co.*, 88 N. Y. 481; *Bajus v. S. B. & N. Y. R. R. Co.*, 103 id. 231; *Williams v. D., L. & W. R. R. Co.*, 39 Hun, 430; *Pauley v. S. G. & L. Co.*, 131 N. Y. 90.) Under the circumstances, the statutory duty to provide fire escapes having been created but shortly before the accident, the defendant being a mere lessee of the premises, for a term which would soon expire,

and upon conditions which prohibited the making of alterations, the statute being crude in form and indefinite in its provisions, and imposing the duty of enforcement upon the factory inspector and his deputies, the approval by the latter of the structures maintained by the defendant and their location operated as a compliance by the defendant with the requirements of the statute, and a complete answer to any charge of negligence. (*Pauley Case*, 131 N. Y. 96; *Keeley v. O'Connor*, 106 Penn. St. 321; *Lafflin v. R. & S. R. R. Co.*, 106 N. Y. 136; *Dongan v. T. C. Co.*, 56 id. 264; *Loftus v. U. F. Co.*, 84 id. 455; *Burke v. Witherbee*, 98 id. 562.) The plaintiff, a man of mature years, having acquired knowledge equal to that of the defendant of the character and position of the fire escapes, assumed the risks and perils thus apparent, and is thereby debarred from recovery. (*Gibson v. E. R. R. Co.*, 63 N. Y. 499; *De Forest v. Jewett*, 88 id. 264; *Shaw v. Sheldon*, 103 id. 667; *Hickey v. Taaffe*, 105 id. 26; *Appel v. B., N. Y. & P. R. R. Co.*, 111 id. 550; *Williams v. D., L. & W. R. R. Co.*, 116 id. 628; *Buckley v. G. P. R. M. Co.*, 113 id. 540; *Ryan v. L. I. R. R. Co.*, 51 Hun, 607; 124 N. Y. 654; *Pitcher v. N. Y. C. & H. R. R. R. Co.*, 127 id. 678; *Davidson v. Cornell*, 132 id. 228; *LaCroy v. N. Y., L. E. & W. R. R. Co.*, 132 id. 570; *Fitzgerald v. N. Y. C. & H. R. R. R. Co.*, 59 Hun, 225.) It was error to permit Dr. Tait to testify that the injuries sustained by Johnson indicated to his mind that Johnson's foot did not strike a flat surface, but a sloping surface. (*Ferguson v. Hubbell*, 97 N. Y. 507; *Van Wycklen v. City of Brooklyn*, 118 id. 424; *Schwander v. Birge*, 46 Hun, 66; *People v. Rector*, 19 Wend. 569; *People v. Bodine*, 1 Den. 311; *Wilson v. People*, 4 Park. Crim. Rep. 619; *People v. Rogers*, 13 Abb. Pr. [N. S.] 376; *Kennedy v. People*, 39 N. Y. 245.) The exceptions to the remark of plaintiff's counsel in summing up entitled the defendant to a new trial. (*Williams v. B. E. R. R. Co.*, 126 N. Y. 97.)

*Walter S. Hubbell* for respondent. The defendant was clearly negligent. (*Willey v. Mulledy*, 78 N. Y. 310;

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*Schwander v. Birge*, 33 Hun, 186; *Pauley v. S. G. & L. Co.*, 131 N. Y. 90.) The plaintiff did not assume the risk of incurring the injury in question, nor was he guilty of negligence contributing to it. (*Pantzar v. T. F. M. Co.*, 99 N. Y. 368; *McGovern v. C. V. R. R. Co.*, 123 id. 280; *Davidson v. Cornell*, 132 id. 228, 235; *Kain v. Smith*, 89 id. 375; *McMahon v. P. H. I. O. Co.*, 24 Hun, 48.)

PECKHAM, J. The plaintiff was another of those unfortunate victims who suffered damage and some of whom suffered death consequent upon the destruction by fire of the factory rented by the defendant in the city of Rochester in November, 1888. In the case of *Pauley* against this defendant, reported in 131 N. Y. 90, we had occasion to review the circumstances attending the terrible catastrophe in which that plaintiff's intestate lost his life. We there held that the law of 1886 (Chap. 409), as amended by chap. 462 of the Laws of 1887, imposed the duty upon the owners or occupants of a certain class of factories to provide fire escapes therefrom, and if, from an omission to perform such duty, an operative was injured, he might recover damages. It was also held that this duty being the creation of the statute, was measured by it, and could not be made to exceed its terms. Prior to the passage of these acts an owner or occupant of a factory not peculiarly exposed to the danger of fire by the character of the work carried on within it, was not bound to anticipate a merely remote or possible danger and to take measures to prevent its occurrence. Such an owner or occupant was not bound by the common law to take any extra and unusual precautions for the purpose of protecting the operatives against the danger arising from fire, which such owner or occupant was not reasonably bound to anticipate. But by the passage of the acts in question we held that a duty was imposed upon the owner or occupant of the prescribed class of factories, for an omission to perform which the operatives who sustained damage caused by such omission might recover. Upon

the facts presented in the *Pauley* case we held that the defendant had not been shown guilty of any violation of the act resulting in damage to the plaintiff, and that no actionable negligence against it had been shown on the trial.

The case now before the court does not involve any of the questions decided in the *Pauley* case. If it did, we should hold ourselves concluded by the decision of that case, although subsequent reflection upon the rule as therein laid down leads us to the belief that it was without doubt correctly decided. The plaintiff in this case was injured while attempting to escape from the burning building by means of the fire escape, which had been attached to the east wall of what is called the elevator shaft of the so-called wing building of the factory. He came down the fire escape ladder until his feet reached the bottom rung, ten feet above the platform herein spoken of, when the heat of the iron and the fire, which was blazing out from the windows past which he descended, and the pain consequent upon the burns which he received from the flames as he was passing down the escape, and the terrible excitement of the moment, all combined to render him temporarily unconscious, and he dropped from the fire escape, and upon recovering consciousness found himself lying across the chute used for the purpose of delivering boxes from the court yard into the door of the factory in the story below, at an angle of about forty-five degrees.

The defendant alleges that it is impossible upon any view of the evidence in the case to ascertain the cause of the plaintiff's injuries, or whether they arose from a cause for which the defendant was liable, or from one for which it was not liable, and that to sustain the judgment against the defendant in this case would be to attribute liability to the defendant upon a purely conjectural and speculative theory. And the defendant urges that within the rule which demands evidence that plaintiff's injuries were caused by some negligence, or by some improper act on the part of the defendant, the plaintiff has entirely failed to prove his case.

In order to make the reasons for our decision as clear as

may be some few further facts must necessarily be stated. It is enough for our purpose here to concern ourselves with the south wall in the so-called wing building of this factory and the ground and structure surrounding it. The south wall ran the whole width from east to west, and formed the northern boundary of a court yard, and that court yard extended south for a distance of more than one hundred feet to Centre street, running east and west. At Centre street this court yard was about 30 feet wide, and somewhat wider at its northern extremity, where this south wall of the wing building crossed it. There was within this court yard an open space of 6 feet 2 inches from the south wall of the wing building southerly to the north wall of what is called the boiler building; and the north wall of this boiler building was about 14 feet high. There was thus left an open space between these two buildings 6 feet 2 inches wide and 14 feet deep, which in the case is called the areaway. The roof of this boiler house formed the paved court yard over which one passed in going south to the exit from the court yard on Centre street. From about the center of the south wall of the wing building an elevator shaft projected to the south, the east wall of which stretched across the areaway and continued up to the full height of the factory wing building. The south wall of the elevator shaft was the north wall of the boiler building and the west wall of the shaft crossed this area again, and the area thus was bounded by the elevator shaft. Persons coming from Centre street into the court yard and going north towards the factory wing building would pass over and upon the paved roof of the boiler building and would thus reach the open area 6 feet and 2 inches wide and 14 feet deep, separating the factory wing building from the paved court yard. There was a door in this south wall of the wing building leading into that building at this point, which was just east of the elevator shaft, and the door was about 3 feet above the level of the paved court yard, and in order to reach the door three steps and a platform were placed over the area and connecting the court yard and

offering a means of entering the factory door. These steps and platform were laid upon iron stanchions leading from the court yard to the door. The platform, one side of which was against the south wall, had been originally between 3 and 4 feet wide and this platform and the steps leading up to it from the court yard formed a covering over the areaway. Down the east wall of the elevator shaft the fire escape ladder had been placed and the south ends of the rungs were two feet 8 inches from the south wall of the wing building, so that a man coming down the ladder facing west or towards the elevator shaft with his back to the east and leaning on the outer or southern edge of the fire escape, would if he dropped straight down land upon the platform above mentioned if it had been maintained in its original condition.

Sometime prior to the fire the entrance to the factory over these steps and platform through the door in that south wall had been closed and fastened and no one any longer entered in that way. The steps leading up to the platform had been taken away and as some of the evidence tended to show one board of the platform itself had been removed, thus leaving the iron framework exposed upon which the steps and the one board of the platform had rested, and leaving but two or perhaps three boards still remaining as a portion of the platform. These steps and the portion of the platform had been removed for the purpose of putting in a chute, running from the court yard down to the bottom of the area and into a door of the factory at that spot. The chute was placed at an angle of about 45 degrees, or perhaps a little steeper, and consisted of two or three parallel boards with risers on each side from 5 to 6 inches high. The chute thus ran directly from the court yard between these iron stanchions and along under the platform down to the door below. There was evidence tending to show that the west side of this platform was built directly against the east wall of the elevator shaft, and that the platform itself came close up against the south wall of the wing building. That is the evidence of the defendant; but the evidence on the part of the plaintiff tended to show



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that there was a space of at least a foot and perhaps a foot and a half between the elevator wall and the west side of the platform. The defendant also gave evidence tending to show that the platform in the condition it was at the time of the fire was three feet wide, and projected four inches beyond the south end of the rungs of the fire escape ladder. It will thus be seen that even upon the defendant's contention, a person coming down the fire escape and getting out to the extreme edge of the ladder, the furthest away from the south wall of the burning building, would, if he dropped mathematically straight down from the lowest rung of the ladder, land within 4 inches of the south edge of the platform which was partly covering this area space, and under which ran this steep chute. If there were but the least inclination of the body to the south when falling, it would drop outside of and beyond the platform. Upon the part of the plaintiff the evidence tended to show that the platform was only from 20 to 30 inches wide.

The precise point contended for by the defendant may now be appreciated. It is said on its part that this fire escape was well and properly constructed, and regarding the first story of the factory as on the grade of the paved court yard, the fire escape came down as far as the statute required; that the defendant at the grade of the court yard had furnished a platform which was the same as the earth itself, and if the plaintiff on dropping from the fire escape fell onto this platform (or earth) and in that way sustained the injury of which he complains, the defendant would not be liable, for the reason that having furnished a fire escape as provided by statute, and the plaintiff having been injured in dropping upon the earth from a perfectly constructed fire escape, the defendant could not be held liable for that misfortune, and however improper may have been the placing of the chute at that particular spot, yet if the plaintiff sustained no injury on account of its position, the defendant is clearly not liable in this action. We will assume that if the

plaintiff sustained injury from falling upon the platform, the defendant would not be liable and that it is necessary for the plaintiff to show that such was not the fact. We also agree with defendant's counsel that if the plaintiff gave no evidence whatever from which an inference might properly be drawn as to where he did sustain the injury, whether from a fall upon the platform or a fall into the chute, and it is left to pure speculation or guess work to decide what did cause his injury, the defendant cannot be held liable. It is true there is no direct evidence on the subject from an eye witness. The defendant says that the plaintiff himself does not pretend to be able to state how it was that he received the injuries in question. No one saw him when he fell; no one was aware of his presence there at the time. He himself got so far down the fire escape as to place his feet on the last rung of the ladder, and just at the very moment of dropping he became unconscious. Whether he fell on the platform or on one of these skeleton iron stanchions or on the chute, plaintiff very frankly says he cannot state; and there is thus, as the defendant urges, an entire dearth of evidence upon which to sustain any recovery in this action.

After a careful reading of the evidence and much reflection upon the inferences that might legitimately be drawn from it, we are of opinion that the plaintiff proved enough upon the question as to the cause of his injuries to call for its decision by the jury instead of by the court. We do not think that such decision rested upon mere speculation, and consequently we do not agree that the verdict of the jury was nothing more than a guess. Upon questions of fact it is sufficient that there is a balance of evidence or probabilities in favor of one side or the other of the dispute, and upon such balance courts will rely in deciding the weightiest issues. (*Weeks v. Cornwell*, 104 N. Y. 325 at 336.) There is evidence here to establish upon a firm foundation these facts; the existence of the iron stanchions upon which originally were laid the steps from the court yard up to the platform and also the platform itself leading to the door of the factory; that all the

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boards composing the steps had been removed, and at least one plank of the platform, and that the width of the platform, was not more than 20, certainly not more than 30 inches; that directly between these iron stanchions and continuing underneath this platform and connecting the court yard and the factory story 14 feet below was this chute running down at an angle of 45 degrees; that the fire escape was on the east wall of the elevator shaft and the end of each rung of the ladder furthest from the wing building wall was at least 2 feet 8 inches therefrom; the last rung of the ladder was 10 feet higher than the platform, and a man, with his feet on that rung and holding on by his hands, would be that distance above the level of the platform, his face would be toward the west and his body as far to the south on the ladder as he could get for the purpose of getting away from the flames coming out of the windows in the south wall; and if the platform were but 20 inches wide, his left side would be at least a foot south of and beyond the edge of the platform and hanging over this chute and almost directly over the skeleton stanchions upon which the steps had once rested. If the platform were 30 inches wide, he would still overreach it.

Upon these facts the inference is entirely admissible and, as we think, is plainly a natural one that if the plaintiff were even motionless when he dropped, he would land outside of the platform, and that he would either strike the stanchion or the chute, and upon this point it is not material to determine which. Judging from the position in which he found himself when his consciousness returned, with his body lying across the chute, his feet to the west and his head to the east of it, the inference from the facts is neither forced nor unnatural, nor mere speculation, and it is that he first struck the west stanchion and had then fallen over upon the chute. He did not strike the chute first, as in that case, falling or dropping directly into it, he would have gone down the chute to the bottom. He probably did not strike the platform first, as it was much too narrow, in that aspect of the evidence which the jury might assume, to afford a landing place for him as he

fell. The jury, therefore, had the right to find from the evidence that in all probability the plaintiff did not first strike the platform or the chute, and there was but one thing else that he might have done and that was to strike the stanchion and break his leg in the manner described and then fall over across the chute as already mentioned. The character of the injuries to the left leg of the plaintiff was such as to favor the inference that he was thus injured. He sustained what the surgeons call a compound comminuted fracture of the leg below the knee, the bones thus broken being driven up and into the knee joint, showing that the force was applied from beneath and upon a slope and not laterally. This could have been caused by striking as the body descended against this iron stanchion, breaking the fall and tumbling the plaintiff from that position over upon his back across the chute.

The evidence of the surgeon, to which exception was taken by the defendant, in regard to the position in which the plaintiff was when the injury occurred was, we think, admissible. He described fully and minutely the character of the injury, the position, extent and nature of the fractures and all the other details which were open to his actual observation and which were capable of exact description. The opinion which he gave, while not absolute, was at the same time admissible as stating the probabilities as to the position of the leg and the point from which the blow came, and the facts which he obtained from his examination formed a reasonable ground upon which to base an opinion as to the cause of the fracture. (*People v. Willson*, 109 N. Y. 345, 353.) Taking all the evidence which he gave upon the facts which he observed from an actual examination of the injury itself, the resulting opinion was not an unnatural or a forced one, and while it was one which possibly any individual might give upon like knowledge derived from such examination of the injury, we think even if the mere opinion itself were erroneously admitted it was not of that character which, when taken in connection with all the other facts in the case, would warrant our reversal of this judgment on that ground.

The question whether the defendant was not guilty of actionable negligence in thus erecting a dangerous structure under the fire escape, and leaving so narrow a platform as to render it impossible for a person dropping vertically from the fire escape to land on it, was left to the jury in a very clear and concise charge by the learned judge who tried this case. Upon the request of the defendant the judge charged that if the plaintiff, when he dropped from the fire escape, landed on the platform and was there injured, that he could not recover; and the jury by the verdict have found as from this evidence we think they had a right to find, that the plaintiff did not drop on the platform, and that he did drop upon and strike either the stanchion or the chute, in all probability the stanchion. The jury have found that the defendant was guilty of negligence in allowing these stanchions and this chute to be placed and to remain in the condition they were at the time of this accident and but partially covered by this narrow platform, and the judge charged that if they found such to be the fact they would have the right to say that the defendant had failed to furnish a proper fire escape within the meaning of the statute. In this, we think, there was no error.

Upon the whole case, we think, the question of defendant's liability was properly submitted to the jury, and the judgment entered upon the verdict in favor of the plaintiff should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

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MILES M. O'BRIEN et al., as Receivers, etc., Appellants, v.  
HUGH J. GRANT, as Receiver, etc., Respondent.

The M. S. Bank and the St. N. Bank entered into an agreement, by which the latter, which was a member of the New York Clearing House Association, a voluntary association of banks and bankers, agreed to act as agent of the former in clearing its checks through the clearing house; the M. S. Bank to keep at all times a balance of \$50,000 in money and \$100,000 of good bills receivable with the former. By the

constitution of said association it is provided that whenever exchanges are made at the clearing house pursuant to arrangement between members, through one of them, and banks not members, the receiving bank at the clearing house shall in no case discontinue the arrangement without giving previous notice; the notice not to take effect until the exchanges of the morning following the receipt thereof shall have been completed. The M. S. Bank was aware of this resolution at the time of making the arrangement, and it sent a letter to the clearing house committee, inclosing copy of a resolution signifying its acquiescence in the terms of the circular issued by that committee. On August 8, 1893, the St. N. Bank, desiring to terminate the arrangement because of failure of the M. S. Bank to keep up the prescribed cash balance, gave the notice required by said constitution, which was served upon the banks constituting the association. At this time the M. S. Bank was insolvent. The St. N. Bank was ignorant of that fact, but knew of it before exchanges were made on the next day. It held at the time certain collateral securities taken upon loans made upon notes of the M. S. Bank, and by agreement they or their proceeds might be applied to any other obligations of that bank. On August ninth the St. N. Bank paid, through the clearing house, checks drawn upon the M. S. Bank by depositors having amounts to their credit as such sufficient to meet the same. In an action brought by the receivers of the M. S. Bank to recover the securities so deposited or the proceeds thereof, *held*, that the arrangement was in effect a tripartite agreement between the banks and the association, made upon sufficient consideration, which could not be discontinued, nor did the liability of the St. N. Bank cease until after the completion of the exchanges of the morning after the notice; that said provision of the constitution was valid and binding, and was not affected by the provisions of the State Corporation Law (§ 48, chap. 687, Laws of 1892), which forbids the assignment or transfer of property by an insolvent banking corporation with the view of giving a creditor a preference; that the insolvency of the M. S. Bank did not excuse the St. N. Bank from the performance of its obligations to the clearing house banks; and so, that it was entitled to hold and apply the securities in payment of the amount so paid by it.

Among the checks so paid by the St. N. Bank were two drawn August 8, 1893, by the state treasurer on the M. S. Bank, which had state funds on deposit. These checks were on that day deposited by the treasurer with a trust company which kept accounts with two clearing house banks and had its checks cleared through them. Said checks were handed in to said banks a little before ten A. M. of August ninth, and were at once sent with other checks to the clearing house, where the business of clearances commences at ten o'clock. By the general and invariable custom of New York banks, checks received between ten A. M. of the day they bear date and ten A. M. of the next day are passed through the clearing house with the clearances of the morning of the

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latter day. It did not appear that the officers of the M. S. Bank knew of the manner in which the state treasurer's checks were deposited, and it appeared that it acted in good faith. *Held*, the presumption was that every check presented in the morning's clearances was held for value; and so, the St. N. Bank was justified in paying the same.

(Argued April 29, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14, 1894, which affirmed a judgment in favor of defendant entered upon the report of a referee.

This action was brought to recover from the defendant certain securities which had been deposited by the Madison Square Bank with the St. Nicholas Bank and the proceeds of the securities, which the latter bank had converted into money.

The following facts were found and are either undisputed or proved. In January, 1891, an arrangement was made between the Madison Square Bank and the St. Nicholas Bank (both of them being state banks); by which the latter bank, which was a member of the New York Clearing House Association, became the agent to clear through the clearing house checks drawn upon the Madison Square Bank. The St. Nicholas Bank submitted in writing a memorandum of the conditions on which it would undertake this business for the Madison Square Bank, as follows :

"\$50,000 balance to be kept at all times, to be free from interest. An allowance of at rate of 2 per cent per annum shall be allowed on average exceeding this amount. The Madison Square Bank is to keep with this bank \$100,000 in approved bills receivable."

In a letter dated January 9, 1891, addressed by the Madison Square Bank to the St. Nicholas Bank, the cashier of the Madison Square Bank says :

"Referring to conversation of our president with your good selves, we would say that we accept the terms and conditions on which your bank agrees to clear for us as per your

memorandum, namely, \$50,000 balance to be kept with you at all times free of interest. Interest at 2 per cent per annum to be allowed us on average exceeding that amount. This bank to keep with you \$100,000 of approved bills receivable. \* \* \* We enclose copy of a letter addressed by us to the clearing house committee to conform with the requirements of their circular of December 18th last."

The letter to the clearing house committee enclosed a copy of a resolution, signifying the acquiescence of the Madison Square Bank with the terms of the circular and authorizing its cashier to send a check for the annual payment of \$200 required of banks clearing through members.

It was verbally agreed between the parties, at the time of the arrangement referred to in said letter of the 9th of January, that other securities of equal value might be substituted from time to time for those first deposited making up the \$100,000 of bills receivable.

The Clearing House Association was and is a voluntary association of banks and banking associations of the city of New York. The object of the association, as stated in its constitution, is "the effecting at one place of the daily exchanges between the several associate banks, and the payment at the same place of balances resulting from such exchanges."

The St. Nicholas Bank was a member of the association. The Madison Square Bank was not so.

Section 25 of the constitution was as follows:

"Whenever exchanges shall have been made at the clearing house by previous arrangements between members of the association through one of their number, and banks in the city and vicinity, who are not members, the receiving bank at the clearing house shall in no case discontinue the arrangement without giving previous notice, which notice shall not take effect until the exchanges of the morning following the receipt of such notice shall have been completed."

This section was in force at and before January 9, 1891, and is still in force, and it was known to be so by the Madison Square Bank at the time of the making of this arrangement.



After the making of this arrangement, and on and after the 13th January, 1891, the St. Nicholas Bank made the clearances at the clearing house for the Madison Square Bank up to and including the 8th day of August, 1893, and the Madison Square Bank deposited and kept good, as to amount and value, its deposit of bills receivable with the St. Nicholas Bank and up to some time in July, 1893, kept good its money balance of \$50,000 in addition thereto. Some time prior to August 8th, 1893, the St. Nicholas Bank desired to terminate the arrangement for making clearances for the Madison Square Bank. At that date it held, also, certain collateral securities, taken upon loans made upon notes of the Madison Square Bank and by agreement they or their proceeds should be applied to any other obligations of that bank.

On the 8th day of August, 1893, the St. Nicholas Bank gave the notice required by the 25th section, that it would cease to make clearances for the Madison Square Bank. This was served upon the banks constituting the Clearing House Association on that day.

By the terms of section 25 this notice took effect upon the completion of the exchanges at the clearing house on the 9th of August. These clearances were made every day immediately after 10 o'clock, and were completed before 12 o'clock.

The St. Nicholas Bank paid, on the 9th of August, through the clearing house, checks drawn upon the Madison Square Bank by depositors having amounts to meet the same to their credit as depositors on the books of the Madison Square Bank, \$372,000. On the 8th day of August, 1893, the Madison Square Bank, after ineffectual efforts to obtain a loan to relieve its immediate necessities, was visited by the clearing house committee and its condition examined; also by an officer of the state banking department. After this examination by the committee of the clearing house their conclusion that the bank was not in a condition to continue business was communicated to the officers and some of the directors of the Madison Square Bank.

The Madison Square Bank did not open for business on the following day. It was, in fact, insolvent on the 8th of August, 1893, and the officers of the St. Nicholas Bank knew before the exchanges were made on the 9th of August that the Madison Square Bank was insolvent, or that its insolvency was imminent and that it had stopped business.

Included in the gross sum of \$372,000, the amount of the checks upon the Madison Square Bank, cleared by the St. Nicholas Bank on the 9th of August, were two checks drawn by Elliott Danforth, the treasurer of the state of New York, against funds of the state deposited in the said bank, which checks were signed and dated on the 8th day of August, 1893, and were deposited in banks in the city of New York, which were members of the Clearing House Association, before 10 o'clock on the morning of the 9th of August, 1893, and were by such banks sent to the clearing house on said 9th day of August. The clearance of said checks was regular and according to the usual course of business among the banks constituting said Clearing House Association, notwithstanding the fact that they were not deposited for collection with a clearing house bank until the morning of the 9th day of August, 1893. The St. Nicholas Bank had no knowledge on the 9th day of August, 1893, of any irregularity in regard to the drawing, deposit or transmission to the clearing house of any of the checks going to make up said gross amount of \$372,000.

The referee found that the payments of checks on the morning of August 9th, 1893, were in the performance of its contract with the Madison Square Bank and were not made with the intent on the part of either of the banks to give a preference to any creditor of the Madison Square Bank over any other creditor; or in violation of the Corporation Law of the state and he held that the plaintiffs were not entitled to recover any part of the money or securities held by the St. Nicholas Bank.

From the affirmance of the judgment entered upon his report, at the General Term, the plaintiffs have appealed to this court.

*Louis Marshall* for appellant. The St. Nicholas Bank was the agent of the Madison Square Bank in the clearing house, and, as such, was not entitled, after the insolvency of its principal became known to it, to pay any checks drawn upon the latter, and was not bound by its contract or by the rules of the clearing house to make such payment. (*Overman v. H. C. Bank*, 30 N. J. L. 61; *M. N. Bank v. Bank of Commonwealth*, 139 Mass. 517; *M. Bank v. E. Bank*, 101 id. 281; *Bank of North America v. Bangs*, 106 id. 441; *M. Bank v. Thomson*, 129 id. 438; *E. Bank v. Bank of North America*, 132 id. 147; *People v. S. N. Bank*, 77 Hun, 181; *F. L. & T. Co. v. Wilson*, 139 N. Y. 284; *Weber v. Bridgman*, 113 id. 600; Mechem on Agency, § 238; *Minnett v. Forrester*, 4 Taunt. 541; *Parker v. Smith*, 16 East, 382; *In re Daniels*, 13 Nat. Bank Reg. 46; *Audenried v. Bentley*, 8 Allen, 302; *Paxton v. Cartney*, 2 F. & F. 48; *Kay v. Dewey*, 7 Ad. & El. 409; *Metcalf v. Wallace*, 15 Gray, 210; *Noble v. Durell*, 3 T. R. 420; *Raisin v. Clark*, 41 Md. 158; *O. C. Bank v. Warren*, 18 Barb. 290; *C. Bank v. Varnum*, 3 Lans. 90; *Dunham v. Dey*, 13 Johns. 40; *Dunham v. Gould*, 16 id. 367; *N. Y. F. Ins. Co. v. Ely*, 2 Cow. 420; *Cayzer v. Taylor*, 10 Gray, 410; *S. Bank v. Bank of Republic*, 67 N. Y. 458; *C. E. Bank v. N. Bank*, 91 id. 74; *Fuller v. Robinson*, 86 id. 306.) Assuming that the contract between the banks, entered into in January, 1891, embodied as one of its terms the rules of the clearing house, and that the latter called for the payment by the St. Nicholas Bank of the checks drawn on the Madison Square Bank after its insolvency became known to the former, the plaintiffs are entitled to recover in this action on the theory that such contract involved the creation of a preference, in violation of section 48 of the Stock Corporation Law. (*Cole v. M. I. Co.*, 133 N. Y. 164; *Throop v. H. L. Co.*, 125 id. 530; *Kingsley v. F. N. Bank of Bath*, 31 Hun, 329; *Robinson v. Bank of Attica*, 21 N. Y. 409; *Gillette v. Phelps*, 13 id. 119; *Brouwer v. Harbeck*, 9 id. 593; *Coursey v. Morton*, 132 id. 556.)

*William Allen Butler* for respondent. The arrangement of January, 1891, between the Madison Square Bank, the St. Nicholas Bank and the New York Clearing House Association for the payment by the St. Nicholas Bank, through the exchanges of the clearing house, of checks drawn on the Madison Square Bank, was valid and legal, and the contemporaneous pledge, pursuant to the arrangement and an incident thereof, of \$100,000 of bills receivable by the Madison Square Bank as security to protect the St. Nicholas Bank as to such payments, constituted a valid and legal pledge. (Laws of 1882, chap. 409, §§ 186, 187; Laws of 1892, chaps. 564, 687.) There was nothing in the arrangement of January, 1891, between the two banks and the Clearing House Association, nor in the agreement, including the arrangement that the Madison Square Bank should keep with the St. Nicholas Bank \$100,000 of bills receivable as security, which was in violation of any provision of the law prohibiting transfers by banks. (*Wood v. E. R. Co.*, 72 N. Y. 196; *V. C. C. Co. v. Murtaugh*, 50 id. 314; *Cameron v. Seaman*, 69 id. 396, 401; *Health Dept. v. Knoll*, 70 id. 530; *Stearns v. Gage*, 79 id. 102, 107; *Shultz v. Hoagland*, 85 id. 464; *Grant v. Nat. Bank*, 97 U. S. 80; *Barbour v. Priest*, 103 id. 293; *Wakeman v. Dalley*, 51 N. Y. 27; *Chase v. Lord*, 77 id. 1.) The relation created between the Madison Square Bank and the St. Nicholas Bank by the arrangement of January, 1891, was not merely that of principal and agent. It was a contract relation and created contractual obligations, binding upon both banks and inuring to the benefit of all the members of the Clearing House Association, under whose constitution and rules the agreement was made, and was valid and binding in respect to the provision that it should continue until terminated by notice to take effect after the exchanges of the morning following the giving of the notice should be completed. (*E. S. Bank v. Davis*, 142 N. Y. 596.) The idea was advanced at the trial that the contract, although valid when made in January, 1891, was "ambulatory," and was renewed from day to day by the substitution of securities, and so was brought under the operation

and inhibition of the Banking Law as to illegal preferences. This is untenable. (*Cook v. Tullis*, 18 Wall. 332; *Clark v. Iselin*, 21 id. 360.) The fact of the insolvency of the Madison Square Bank, whether known to the St. Nicholas Bank or not, worked no change in the contract relation existing between them. (*People v. Remington*, 121 N. Y. 328.) The intervening insolvency and closing of the doors of the Madison Square Bank between the time of the giving of the notice by the St. Nicholas Bank on August 8, 1893, and the completion of the exchanges through the clearing house on the morning of August 9, 1893, did not in any way invalidate the payments made by the St. Nicholas Bank in performance of its contract of the checks paid in the exchanges through the clearing house on the morning of August 9, 1893. (Stock Corporation Law, § 48.) The holders of the several checks drawn against funds in the Madison Square Bank by depositors and delivered to the third parties who deposited them in other banks and collected them through the clearances of August 9, 1893, were entitled to such payment and to the benefit of the protection afforded by the securities held by the St. Nicholas Bank. (*Watts v. Shipman*, 21 Hun, 598; *People v. M. & M. Bank*, 73 N. Y. 269; *People v. S. N. Bank*, 77 Hun, 159.)

GRAY, J. The St. Nicholas Bank claims the right to apply the securities and moneys theretofore deposited with it by the Madison Square Bank towards the reimbursement of its payments, or clearances, of the latter's checks on the morning of August 9th, 1893. With respect to that claim the proposition of the plaintiffs is twofold. They say that rule 25 of the clearing house did not require the Saint Nicholas Bank to clear the checks drawn on the Madison Square Bank, presented after it became aware of the insolvency of the latter, and that such insolvency terminated the relation of clearing house agent and rendered any payments made unauthorized; or, if the clearing house rule is susceptible of the interpretation that it required the Saint Nicholas Bank to honor checks drawn on the

Madison Square Bank after its insolvency became known to it, the contract between the banks, in so far as it contemplated such payment and the use of the securities of the Madison Square Bank to secure the advances made by the Saint Nicholas Bank, was an illegal preference under the statute. The controversy must turn, in my opinion, upon the nature of the relation which existed between the two banks in question and the clearing house and upon what was the extent of the obligation entailed upon the St. Nicholas Bank, in engaging to receive and to clear checks drawn upon the Madison Square Bank, when presented through the clearing house. For the plaintiffs it is argued that, as between the Madison Square Bank and the St. Nicholas Bank, the relation, simply, of principal and agent was created and, therefore, upon the insolvency of the former becoming known, on the morning of the day when clearances of the previous day's checks were to be effected, that the latter bank was not entitled to pay checks drawn upon the former bank. But I think to view the relation as such is altogether incorrect and unwarranted by the facts. In a certain and limited sense the St. Nicholas Bank, of course, would act as an agent, in clearing and paying checks drawn upon the Madison Square Bank. That, however, was a mere feature of that larger contractual relation, into which the two banks had entered with the Clearing House Association, and which characterized all their dealings. The agreement of January, 1891, was one to which there were three parties; each of which was moved to enter into it by a legitimate consideration. The Madison Square Bank acquired the very substantial advantages, which the members of the Clearing House Association enjoyed, in the increased convenience, dispatch and safety of banking transactions. The St. Nicholas Bank acquired advantage, benefit and a protection by the deposit of collateral securities to the amount of \$100,000 and of the cash, required to be made by the Madison Square Bank. The cash deposit was to be free of interest and maintained at a daily balance of \$50,000. The members of the Clearing House Association, in extending to the Madison Square Bank the right to

have its checks cleared and paid through one of its members, were assured that all checks presented would be paid up to, and including, the day following the giving of notice by the St. Nicholas Bank of the termination of the arrangement between itself and the Madison Square Bank. The learned referee very correctly defines the arrangement between these two banks and the clearing house as constituting a tripartite agreement upon ample consideration, for the mutual benefit of all the parties who entered into it. That agreement provided for the length of its duration; for the maintenance at all times of the stipulated security to protect the St. Nicholas Bank and bound that bank to receive and pay the checks drawn upon the Madison Square Bank as it would its own.

The St. Nicholas Bank could only agree and arrange to clear for the Madison Square Bank, in accordance with conditions imposed by the constitution and rules of the Clearing House Association; and an essential condition was that the arrangement could not be discontinued, nor should its liability cease, until after the completion of the exchanges of the morning next following the receipt of a notice of discontinuance. There was nothing in such a provision of the constitution of the clearing house, which was objectionable, legally speaking, or otherwise. It was perfectly competent for the banks to form themselves into this voluntary association and to agree that they should be governed by a constitution and by rules. When adopted, they expressed the contract by which each member was bound and which measured its rights, duties and liabilities. (*Belton v. Hatch*, 109 N. Y. 593.) If not in conflict with rules of law, they must be awarded that effect which is always accorded to the deliberate engagements of parties. The provisions of section 25 of the constitution of the Clearing House Association were designed as a security and a protection for the members, in the event mentioned. When the Madison Square Bank made its arrangement with the St. Nicholas Bank and, also, made compliance with the terms of the demand of the clearing house circular, I think it is clear that a definite contractual relation was at once created between the three

parties; whose provisions and relative engagements were effectually defined and controlled by the constitution and rules of the clearing house, in so far as they touched the proposed clearances of checks. The contract, which bound the members of this voluntary association of banks and regulated their duties, rights and liabilities, permitted the representation of an outside bank, through a member; provided that member assumed a liability, which should not cease, until the completion of clearances on the morning next after its notice of a discontinuance was given. That liability, so exactly provided for, is, however, sought to be limited to cases, where insolvency has not supervened, as to the non-member bank. If the relation here was strictly that of an agent acting for a principal the question might be a serious one; but even then much might be said in favor of the liability which the agent had, with the assent of the principal, assumed. That, however, was not the relation. The Madison Square Bank was a contracting party in an agreement, to which the other parties were the St. Nicholas Bank and the Clearing House Association, and it had accepted and had become bound by provisions in the latter's constitution and rules. That agreement was entered into at a time when it was perfectly competent to make it and its duration was fixed by section 25 of the constitution of the clearing house. As the respondent's counsel says, every bank entitled to the payment of checks sent by it through the exchanges of the clearing house, in due course, had a right to rely upon the liability of any other bank clearing for the non-member and unless this liability continued definitely and up to a certain period, the liability of the clearing bank would not be fixed and enforceable. Here, the effect of the constitution and rules of the clearing house upon the agreement was as though it had been stated, in so many words, that it should commence upon January 13th, 1891, and should be at an end on August 9th, 1893, after the clearances of that day had been completed. What was there in the agreement and its incidents, which contravened any rule of law or of



policy? The plaintiffs say that the effect is to give an illegal preference under the statute; which, it is meant, would be accomplished by the payment of checks, after the insolvency of the non-member bank is known, and by the use by the clearing bank of the deposited securities in reimbursement thereof. To that I cannot agree. The statute referred to is the State Corporation Law (Chap. 687, Laws of 1892); which, in section forty-eight, contains previously-existing provisions of the Banking Law of this state. The provisions of the section forbid the assignment or transfer of any property, "when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation." This provision has no application to such a case as this; where, at the time when the arrangement was made with the St. Nicholas Bank, the Madison Square Bank was solvent. It would be absurd to speak of the agreement of January, 1891, as having been made in contemplation of future insolvency, or with the intent to give a preference to any creditor of the Madison Square Bank. If there is any presumption respecting the business engagements of going concerns, it is that they will be fulfilled; and, when security is exacted, it is as a business precaution, to compel exact and prompt performance, rather than a provision in contemplation of insolvency. If it were otherwise, business transactions, which have for their subject the accommodation of one corporation by another, in the loan of money, or the extension of credit, would be seriously embarrassed, if not checked. The statute recognizes the right of a banking corporation to transfer promissory notes, or evidences of debt, received in the transaction of its ordinary business, to purchasers for a valuable consideration and it may lawfully do so in pledge to secure its creditor, when it is in a condition of solvency. The deposit of securities made by the Madison Square Bank with the St. Nicholas Bank constituted a lawful pledge of its assets, to protect the former against any possible loss in undertaking to clear and pay all checks drawn upon the latter and sent through the clearing house. The invalidity

of a transfer or assignment of property by a banking corporation, under the Banking Law, is where it has been made while in a condition of insolvency, or in contemplation of it, and with the "intent" of giving a preference. The "intent" must exist and be inferable to vitiate the transaction. In this connection, our recent decision in *Elmira Savings Bank v. Davis* (142 N. Y. 590) may be referred to; where the question involved was whether the preference given to savings bank deposits by the State Banking Law was in contravention of the United States National Banking Law; which avoids transfers, or assignments, or deposits, made with a view to prefer a creditor. It was there said, and the observation is applicable here, that "it is the voluntary act of the national bank, in contemplation of its insolvency and with the view of then preventing the ratable application of its property, which is avoided by the national law. In the present case, while a going concern, it entered into an engagement with the savings bank, which the state law required and regulated; which vested in the latter superior rights or equities, and which, in the possible event of future insolvency, would give to it a prior claim to payment from the assets. When that event happened and the receiver was appointed, he took over the property of the insolvent concern, as trustee for its creditors and shareholders, under the same conditions as the bank held it and subject to the right of this plaintiff to be first paid in full, before other creditors were paid." So I say here, the plaintiffs, upon becoming vested as receivers with the property of the insolvent Madison Square Bank, held it subject to all rights lawfully acquired and to all superior equities; among which was the right of the St. Nicholas Bank, by virtue of an agreement, valid in its inception and at all times, to apply the securities in its possession in reimbursement of its payments of checks presented through the clearing house on the morning of August 9th, 1893; payments which it was obliged to make, as well by the rule of commercial honor, as by force of the obligations imposed by the constitution and rules of the clearing house. Nor do the cases of *Overman v.*

*The Bank*, (30 N. J. L. 61) and *Merchants' Bank v. Bank of Commonwealth* (139 Mass. 518), referred to, touch this question of the obligation of the clearing bank under the constitution and rules of the clearing house and with reference to which the non-member had contracted — a distinction recognized in the *Overman* case cited.

The plaintiff's counsel suggests a possible illustration of the effect of the construction, which is given to this section of the clearing house constitution. He says, all the creditors of the Madison Square Bank, becoming aware of its insolvency, might have drawn checks upon their deposits and, if they succeeded in getting them presented by clearing house banks, the St. Nicholas Bank would have been compelled to pay them, to its possible ruin. The illustration, however, proves nothing. That may be said to have been a risk assumed by the St. Nicholas Bank; but very much of the business of the land, and especially that portion which is done in Wall street, is conducted upon faith and experience has shown that it has not, in the main, been misplaced. For such a contingency as counsel suggests, it was necessary that the officers of the Madison Square Bank should have been parties to an immoral and illegal scheme. The St. Nicholas Bank must be deemed to have contemplated and to have assumed every risk, in undertaking to become responsible for the Madison Square Bank, and to have exercised such reasonable judgment in doing so, and to have taken such security against loss therein, as the practical observation and the business experience of its officers suggested.

The conclusion I have reached is that the insolvency of the Madison Square Bank did not excuse the St. Nicholas Bank from the performance of its obligations towards the clearing house banks. What rather emphasizes the interest in the question of the right of the St. Nicholas Bank to clear and pay, on August 9th, 1893, all the checks drawn upon the Madison Square Bank and presented by clearing house banks, is the fact that there were four checks, exceeding in the aggregate the sum of \$300,000 which were drawn

under somewhat peculiar circumstances. I may refer to two of them, aggregating \$250,000, which were drawn by Mr. Danforth, then state treasurer, on August 8th, 1893, who had heard enough, in some way, to take alarm at the situation of the Madison Square Bank with which were state funds on deposit. He arranged to deposit them with the Manhattan Trust Company, which kept accounts with the Chase and the Continental National Banks and had its checks cleared through them. The two checks were handed into the two banks, at a little before ten o'clock of the morning of August 9th, 1893, and were at once sent, with all other checks, to the clearing house, where the business of clearances commences to be transacted at ten o'clock. The evidence conclusively shows that there was nothing unusual in this transaction. It is the general and invariable custom of the banks in New York city to pass all checks, dated upon the previous day and received between ten o'clock of that day and ten o'clock in the morning of the day following, by hand, or by mail, through the clearing house with the clearances of that morning. Checks may come in the morning by mail, or may be brought in by local depositors, before ten o'clock and it is considered to be regular and in the exercise of business prudence to have them cleared as promptly as the rules allow. In this case there is nothing to show that the officers of the Madison Square Bank knew of the manner in which the state treasurer's checks were deposited for payment by the Manhattan Trust Company, or that they had anything to do with their drawing. It appears that that company acted in good faith in the matter and Mr. Waterbury, its president, testified that there was nothing unusual, or contrary to the usual course of business, in getting Mr. Danforth's checks put promptly through the clearing house that morning and it is difficult to see how it would be material, if it was otherwise. As to the two banks, which acted for the trust company, they appear to have merely performed their duty to their depositor in passing the checks severally through the clearing house. Nor can it be pretended that the St. Nicholas Bank had any knowledge

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or notice respecting these checks, or any of the checks, which it paid in its clearances of August 9th. Its officers had no knowledge of the insolvency of the Madison Square Bank until that morning. Its notices of the day previous to the various banks, that it would no longer continue to clear for the Madison Square Bank, were based on a dissatisfaction with its failure to keep good its promised daily cash balance of deposits. Until the clearing house committee completed its examination of the condition of the latter bank, in the afternoon of the eighth of August, it was not known how it stood. The time was one of great excitement and of a distrust in financial circles, which cast its shadow over many banks, and a bank, to justify being assisted by the associated banks, must show itself to possess sufficient resources in the possession of assets of real value. The attention of the clearing house committee being called to the Madison Square Bank, their examination resulted in the advice that it should suspend. They did not decide as to the solvency of the bank. It might resume, if it succeeded in making such arrangements as would put it in the possession of funds by realization upon its assets. However that might be, the bank decided not to open its doors on the following morning. It was affirmatively testified to by the cashier of the St. Nicholas Bank that they had no suspicion of the inability of the Madison Square Bank to continue its business, when sending out notices to other banks; but thought it unsafe to continue clearing for it, in view of its past conduct. If the evidence showed any knowledge in the St. Nicholas Bank as to the particular checks, as to which so much has been urged and which it paid in the clearances of the morning of August 9th, or if it had such notice concerning the designs of their drawers as to make it an abettor in an unlawful scheme to obtain a preference over other creditors, a very different question would be presented. But there was nothing whatever to charge it with any knowledge, or notice, and all the evidence goes to prove that it acted in perfect good faith; and that being so and its payment of checks, passing through

the clearing house on the morning of August 9th, having been made in discharge of the liability resting upon it, under the constitution and rules of the association, it not only could not, but it should not, be made to suffer a loss. The knowledge possessed by it in common with the public, in the morning of August 9th, did not change its position, nor affect its liability. The presumption was that every check presented at the morning's clearances was held for value and it was for the plaintiffs to rebut that presumption and to show that the banks presenting checks were not acting in good faith in what they did, but merely as agents for the drawers in obtaining the funds drawn against. They failed to do so. More than that, the evidence established the contrary, except in the possible instances of the two checks drawn by the Uhlmans; which were two of the four checks I mentioned as taking the clearances of August 9th, 1893, out of the ordinary. I deem it unnecessary to discuss the facts respecting them. The St. Nicholas Bank was in no respect more informed about their making, or their collection, than it was about the other checks. If there was anything irregular concerning them, I agree with the learned referee that the question would affect, not the St. Nicholas Bank, but the right of the bank which presented them to hold their proceeds. If we leave out of consideration the two Uhlman checks, the balance of account is still against the plaintiffs and their action would have to fail any way.

For these reasons, as for those which were well expressed by the very learned referee and with which they are in harmony, I think the judgment below was right and I advise its affirmance here.

All concur, except ANDREWS, Ch. J., and PECKHAM, J., dissenting.

Judgment affirmed.

HASKELL H. MARKS, by Guardian, etc., Respondent, v.  
ROCHESTER RAILWAY COMPANY, Appellant.

Defendant operated a single-track street railroad, using one-horse cars in charge of a single employee, who acted as conductor and driver. The cars passed each other by means of switches. The rear platform of each car, where passengers enter, is two feet narrower than the distance between the rails; at the rear of this platform is a dash half its width and about thirty inches high. The brake is in front of the driver's platform. Two cars met in a space between two switches; in order to take one of them back to a switch the horse was unhitched and the driver called upon plaintiff, a boy about eleven years old, to take the reins; he drove the horse around to the rear of the car, and after the whiffletree was attached took his place on the rear platform, and by direction of the driver started the horse, the driver taking his place on the front platform to manage the brake. Some boys in the car, frightened by the driver, who ordered them to get off the car, and hurrying to get off from the platform on which plaintiff was standing, pushed him therefrom and he was injured. In an action to recover damages the only specification of negligence in the complaint was that the platform was unsafe upon which to place a boy of plaintiff's age to perform the duties imposed on him, and upon the trial the question of negligence was confined to this point. *Held*, that the emergency authorized the driver to employ outside assistance; but that there was no reasonable ground for holding that the rear platform was an unsafe place to put the plaintiff, or that there was any negligence in placing him upon it to drive the horse; and so, that the question was improperly submitted to the jury.

The General Term, in reversing an order granting a new trial, held that the verdict could stand upon the ground of negligence of the driver in driving the boys from the car when in motion. *Held*, error; that as this was not presented to the jury, and they were not permitted to consider it, the verdict could not be sustained on that ground; that if sustainable it must be sustained on the ground upon which the case was submitted.

*Marks v. Rochester R. Co.* (77 Hun, 77), reversed.

(Argued April 30, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 27, 1894, which reversed an order granting a new trial and ordered judgment on a verdict in favor of plaintiff.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of defendant, a street railway corporation.

The plaintiff, at the time a boy of eleven years and four months of age, was run over by one of the cars of defendant upon St. Joseph street in the city of Rochester, N. Y., upon the 23rd day of February, 1892, in consequence of which his leg was crushed so as to require amputation.

The line of the defendant's road upon St. Joseph street, at that time, was a single-track line, the cars meeting and passing each other by means of switches placed at intervals. The cars in use were one-horse cars in charge of a single employee, who was at the same time driver and conductor. His position was in an inclosed platform in front of the car. The brake was at the front of that platform. The entrance for passengers was by means of a narrow platform open at the sides at the rear end of the car. The rear platform was three feet four inches wide. At the end was a dash about twenty inches wide and about thirty inches in height with a rounded top. The platform was ten inches below the floor of the car and fourteen inches above the rail. The distance between the rails upon which the car ran was four feet eight and a half inches inside. The rails themselves were about four inches wide, so that from the outside of one rail to the outside of the other was upwards of five feet four inches. The body of the car was seven feet two and a half inches wide at the widest part. The length of the car was sixteen feet two and a half inches, including platforms. These measurements show that the guard upon the back of the rear platform protected just half of the space, leaving an unprotected space of ten inches upon each side; that the platform itself was two feet narrower than the distance between the rails, leaving an open space of one foot on either side unprotected from the wheels; that the body of the car was nearly four feet wider than the platform, so that there was an extension of the side of the car nearly two feet upon each side beyond the edge of the platform.

Upon the day in question the plaintiff was chopping ice upon the sidewalk in front of his father's house on St. Joseph street, when his attention was attracted by the approach of two



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street cars of the defendant from opposite directions upon the single track in that street. The nearest switch was some distance south. After considerable altercation between the drivers, it was decided between them that the one who had come from the south should go back to the switch. To go back to the switch it was necessary to hitch the horse to the rear end of the car and pull the car backward to the switch. To do this required two persons, one to drive and the other to manage the brake. The driver thereupon called to the plaintiff and told him to come and take the lines. The plaintiff drove the horse around the car, and after the whiffletree was fastened to the rear end of the car, he got upon the rear platform, and the driver told him to go ahead, he himself going back to manage the brake. After the car had proceeded a short distance, a number of other boys jumped upon the car and some of them got in the car and started to swing the car by dancing. The driver halloosed for the boys to get off. At this time the car was moving, the horse being on a trot. They did not do so, and he halloosed again, and stamped his foot, and made a rush or feint as though he were coming through the car to drive them off, at which the boys took fright, and scrambled off the car as fast as they could, and in doing so pushed the plaintiff off the platform. He was thrown under the car, and received the injuries complained of. The father and mother of the plaintiff knew nothing of his employment to drive the car, and did not consent thereto. The evidence is undisputed, the defendant offering no evidence whatever upon the second trial.

The defendant moved for a non-suit upon various grounds, and took exceptions to the charge of the court and refusals to charge as requested.

The jury found a verdict for the plaintiff for \$7,000.

Further facts are stated in the opinion.

*Charles J. Bissell* for appellant. The trial court erred in denying the defendant's motion for a non-suit. (*Church v. C. N. & C. V. R. R. Co.*, 6 Law. Rep. 861; *Degg v. M. R.*

*Co.*, 1 H. & N. 773; *Everhart v. T. H. & R. R. Co.*, 78 Ind. 292; *Osborne v. K., etc., R. R. Co.*, 68 Maine, 49; *Barstow v. O. C. R. R. Co.*, 143 Mass. 535; *N. O. R. R. Co. v. Harrison*, 48 Miss. 112; *Flower v. P., etc., R. Co.*, 69 Penn. St. 210; *A. T. & S. F. R. R. Co. v. Lindley*, 6 Law. Rep. Ann. 646; Beach on Neg. 438; 2 Thompson on Neg. 1040; *Bradley v. N. Y. C. R. R. Co.*, 62 N. Y. 99; *Flower v. P. R. R. Co.*, 99 Penn. St. 210; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Wendell v. N. Y. C. & H. R. R. Co.*, 91 id. 420; *Tucker v. N. Y. C. & H. R. R. Co.*, 124 id. 308; Boswell on Civil Liability for Personal Injuries, 134, 145; Whart. on Neg. §§ 73-155; *Dugan v. C. T. Co.*, 56 N. Y. 1; *Tutein v. Hurley*, 98 Mass. 211.) The trial court erred in refusing to charge the jury in accordance with the request of the defendant's counsel, and the exception to such refusal was well taken. This request was predicated upon the assumption that the jury should find upon the questions of fact submitted to them by the court, that there was no reasonable necessity for the employment of any one to assist the driver; that if there existed no such necessity, then the defendant was not responsible for the subsequent consequences to the plaintiff. (*Finley v. H. E. R. Co.*, 64 Hun, 373; *Wilton v. M. R. R. Co.*, 107 Mass. 108; 125 id. 130.) Assuming that the emergency existed, and the driver was authorized to employ assistance and did employ the plaintiff, if they then became co-servants and the plaintiff was injured solely by reason of the negligence of his co-servant, then there can be no recovery, and the question whether the plaintiff was or was not a fit and proper person for the employment does not enter into the inquiry. (*Flower v. P. R. R. Co.*, 99 Penn. St. 210.)

*Eugene Van Voorhis* for respondent. If the driver had authority, implied or otherwise, to call in assistance, it was a matter in his discretion and judgment, as to whom he should call upon, and any mistake made by him in the exercise of that discretion was a mistake of the master. For the purpose

of obtaining assistance in the performance of the master's duty he was the master; it was the duty of the defendant to employ competent persons for the transaction of its business. It must expect to suffer, if it sees fit to retain careless and reckless drivers in its employ. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Day v. B. C. R. R. Co.*, 12 Hun, 438; 76 N. Y. 593.) Whenever there is a temporary employment of a bystander in an emergency, by a servant who may be held to have had authority to contract for an assistant, the master should be held liable if such assistant is injured by the negligence of his servants. The doctrine of the non-liability of the master for the negligence of a co-employee does not apply to such case. (Beach on Cont. Neg. § 342; 2 Thomp. on Neg. 1040, § 39; *Bradley v. N. Y. C. & H. R. R. R. Co.*, 62 N. Y. 99; *C. T. Co. v. Texas*, 32 Fed. Rep. 448; *Terra Haute v. McMurray*, 98 Ind. 358; *L. R. R. Co. v. Mo Veigh*, Id. 391; *P. Co. v. Gallagher*, 40 Ohio St. 637; *Flike v. B. & A. Co.*, 53 N. Y. 549.) The court properly submitted to the jury the question as to whether or not, assuming there was an emergency, the driver exercised proper care, under the circumstances, in employing a boy of the size and age of the plaintiff, and placing him upon this platform to drive the horse. (2 Thomp. on Neg. 978; Beach on Cont. Neg. § 362; *Brennan v. Gordon*, 118 N. Y. 489; *Hickey v. Taaffe*, 105 id. 26; *Healey v. H. B. Co.*, 18 N. Y. Supp. 754; *Baird v. Richardson*, 4 N. Y. S. R. 648; *Hill v. Gust*, 97 Ind. 45; *Kehler v. Schwenk*, 144 Penn. St. 348; Laws of 1889, chap. 560, § 2; *Ansteth v. B. R. Co.*, 145 N. Y. 210; *Hogan v. C. P. R. Co.*, 12 id. 647.) It cannot be said as a matter of law that the plaintiff assumed the risk of the accident which befell him. (*Darling v. N. Y. C. & H. R. R. R. Co.*, 90 N. Y. 670; *Byrne v. N. Y. C. & H. R. R. R. Co.*, 83 id. 620; *Thurber v. H. B. & N. Co.*, 60 id. 326; *Berry v. N. Y. C. & H. R. R. R. Co.*, 92 id. 289; *O'Mara v. H. R. R. R. Co.*, 38 id. 445; *Maher v. C. P. R. Co.*, 67 id. 52; *Swift v. S. I. Co.*, 123 id. 645.) The claim of defendant's counsel, that assuming the defendant's driver was negligent in placing

the plaintiff in an unsafe position, that was not the proximate cause of the accident; that an unforeseen event, to wit, the crowding of the plaintiff off the platform by the other boys in their scrambling to get away from the driver, was the immediate occasion of the plaintiff's injury, and that for this the defendant was not responsible, is untenable. (*Sheridan v. B. & N. R. R. Co.*, 36 N. Y. 39; *Day v. B. C. R. R. Co.*, 12 Hun, 440; *Gibney v. State*, 137 N. Y. 1; *Lowery v. M. R. Co.*, 99 id. 158; *Phillips v. N. Y. C. & H. R. R. Co.*, 127 id. 657; *Ivory v. Town of Deer Park*, 116 id. 476; *Putnam v. N. Y. C. & H. R. R. Co.*, 47 Hun, 489; *Ring v. City of Cohoes*, 77 N. Y. 83; *Holton v. Town of Champion*, 128 id. 599; *Voak v. N. C. R. R. Co.*, 75 id. 320; *Gill v. R. & P. R. R. Co.*, 37 Hun, 107; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Houghtaling v. Shelley*, 51 Hun, 598; *Merrill v. FitzGibbons*, 29 id. 634; *Ryan v. Miller*, 17 Wkly. Dig. 112; *Lay v. N. Y. Central*, 19 id. 289; *Weiler v. Manhattan El. R. Co.*, 53 Hun, 377.) We have, up to this time, considered the plaintiff as an employee of the defendant, under a temporary employment in an emergency. That was the theory upon which the case was submitted to the jury, and the correct theory of this case. If the plaintiff was not an employee he was either a trespasser or must be classed as a passenger. If the plaintiff was not a passenger or an employee he was a trespasser. It matters not whether he be called a volunteer or by whatever name. If he was upon this car without the consent of the defendant, express or implied, he must be deemed to have been there against its will. (*Ansteth v. B. R. Co.*, 145 N. Y. 210; *Day v. B. C. R. Co.*, 12 Hun, 439; 76 N. Y. 593; *Clark v. N. Y., L. E. & W. R. R. Co.*, 40 Hun, 605; 113 N. Y. 670; *Hogan v. P., etc., R. Co.*, 124 id. 647; *Biddle v. H., etc., R. R. Co.*, 112 Penn. St. 551; *Benham v. F. H., etc., R. R. Co.*, 45 Conn. 284; *McCann v. S. A. R. Co.*, 117 N. Y. 505; *Beach on Con. Neg.* 387; 2 *Thomp. on Neg.* 1197, § 40; *P. & A. R. R. Co. v. Caldwell*, 74 Penn. St. 421; *Biddell v. H., etc., R. R. Co.*, 112 id. 551; *Wilton v. M. R. R. Co.*,

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107 Mass. 108; 125 id. 130; *Muelhausen v. S. L. R. R. Co.*, 91 Mo. 332; *Brenan v. F., etc., Co.*, 45 Conn. 284; *Corcoran v. N. Y. E. R. R. Co.*, 19 Hun, 368; *P. Co. v. Hazard*, 75 Penn. St. 367; *M., etc., R. Co. v. Moore*, 41 Am. & Eng. R. Cas. 240; *Sherman v. Hanibal Co.*, 72 Mo. 65.)

ANDREWS, Ch. J. On the first trial the jury disagreed. The plaintiff on the second trial recovered a verdict for \$7,000, which the trial judge subsequently set aside for what he regarded as his own error in refusing a non-suit. On appeal from the order setting aside the verdict, the General Term reversed the order and directed judgment on the verdict, which was entered, and this appeal is brought by the defendant from the order of the General Term and the judgment pursuant thereto. The complaint alleges that the plaintiff was engaged in assisting in the management of the car under the direction of the driver, and was placed on the rear platform to drive the horse, and while so engaged was crowded from the platform by persons who were leaving the car, and was thrown under the wheels and injured, and that the injury was caused by the negligence of the defendant. The only specification of negligence contained in the complaint is that the platform on which the plaintiff was stationed for the purpose of driving the horse was an unsafe and unfit place upon which to put a boy of his age to perform the duty imposed upon him.

The trial judge submitted to the jury two questions, *first*, whether there existed such an emergency at the time as to authorize the driver of the car to employ outside assistance to get the car back to the switch, and, *second*, if the jury found that such an emergency existed, whether he was negligent in placing a young boy under the circumstances upon the platform to drive the horse. The judge excluded from the consideration of the jury any claim of negligence other than the one set out in the complaint, and explicitly instructed them that unless they should find that the defendant was negligent in placing the plaintiff upon the platform to drive the horse,

the action could not be maintained. The question whether the driver was guilty of negligence in ordering the other boys to get off the car while it was in motion was not submitted to the jury. The trial judge seemed to assume that if the defendant was negligent in employing the plaintiff, by reason of his tender years, and placing him on the rear platform to drive the horse, it was chargeable for all that subsequently happened, independently of the question whether a new agency had intervened, which was the proximate cause of the injury. He granted the motion for a new trial because, upon further consideration, he had reached the conclusion that there was no negligence in employing the plaintiff for the service to which he was put, and also for the further reason that assuming there was negligence in this respect, it was not the proximate cause of the injury. The General Term, in reversing the order granting a new trial, expressed the opinion that the question of the defendant's negligence in placing the plaintiff upon the car to drive the horse, in view of his age and inexperience, was properly submitted to the jury, and that the verdict upon that ground was justified, but the court also held that the verdict could stand upon another ground, namely, the negligence of the driver in expelling the other boys from the car while in motion, in the manner disclosed by the evidence.

Whatever ground there might have been for presenting the case in this aspect to the jury, the verdict did not proceed upon that view. This aspect of the case was not presented to or passed upon by the jury. They were not permitted to consider it as a ground of their verdict, because the case was, by the explicit direction of the judge, made to turn upon the one question of negligence in placing the boy on the platform to drive the horse. The verdict, if sustained at all, must be sustained on the ground upon which the case was submitted to the jury. It would be obviously improper to sustain it on an independent ground which the jury were not permitted to consider. The trial judge, after the conclusion of the main charge in response to a request made by the defendant, but qualifying it, charged in substance that if the jury should find that the

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driver was authorized under the circumstances to employ the plaintiff to assist him, and that he was of sufficient age and experience to make it proper for the driver to employ him and place him in the position he did, the plaintiff was a co-employee and could not recover, although the driver was negligent in ordering the boys to leave the car while in motion. The judge in this, as in the main charge, made the liability to depend on the original negligence in employing the plaintiff and placing him on the rear platform to drive the horse.

The counsel for the defendant, on the trial, excepted to the submission to the jury of the question of the existence of an emergency which authorized the driver to procure outside assistance, and also to the submission of the question of negligence in employing the plaintiff to render the service required. The judge at the trial and the judges at General Term concurred in the view that an emergency existed which justified the driver in employing assistance to escape from the dilemma brought about by the meeting of the cars. It is not claimed that the driver had any general authority to employ servants for the defendant. If he had authority to employ assistance under the circumstances of the case, it was an authority outside of the general scope of his employment. Clearly he had no authority, express or implied, to call upon bystanders to assist him in the discharge of any service which he himself could reasonably perform. If third persons undertook upon his solicitation and for his convenience to assist him in extricating the car from the blockade, when he could have accomplished the work himself, no authority to employ assistance could be implied. Such an implication could only arise when, in view of all the conditions, the driver could not himself without assistance, having a proper regard for the safety of passengers and the care of the car, have undertaken to take the car back to the switch. It is obvious that the driver could not at the same time have managed the brake and driven the horse. The driver of the other car had his own car and the horse to look after, and it does not appear that there was any other employee of the

company in the vicinity to whom the driver of the car which was to be moved could have applied for assistance. While the evidence is not very direct or satisfactory as to the necessity for aid, we think that question was properly submitted to the jury. The defendant gave no evidence upon the point. The conduct of the driver indicates that, in his opinion, assistance was necessary, and the jury might reasonably have reached the conclusion upon the evidence before them, in the absence of any contradictory evidence, that there was an emergency which gave to the driver authority to call in outside aid on the occasion. The authority of a servant is not in all cases confined to the rendering of personal service. In every business and employment there are exigencies which are not anticipated and which require a servant to act, in the absence of the principal, for the immediate protection of his interests, and he may do things in his interest when the emergency arises which transcend his usual authority, and they will be deemed to have been authorized.

The jury having found that such an emergency existed in this case, the employment of the plaintiff to drive the horse was the act of the principal, and if his employment in this service directly by the principal would have been an act of negligence, his employment by the driver, acting for the time being in place of the master, was a negligent act imputable to the defendant. The service which the plaintiff was called upon to render was unquestionably intended to be a gratuitous service. He went upon the car in compliance with the request of the driver. If the service required of the plaintiff was a dangerous one for a boy of his age, from which personal injury to him might reasonably have been anticipated, the defendant might justly be chargeable if injury happened which was the natural consequence of the employment. The plaintiff, by reason of his youth and inexperience, might not appreciate the risk, and he would not be held to the exercise of the same discretion and judgment in entering upon the service as would be required of an adult. The question whether a child is *sui juris* generally arises in actions based on negligence, and



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where contributory negligence either of the child or his parents is relied upon as a defense. The plaintiff was within the authorities old enough to exercise some degree of care. But if such a boy was an unfit person to place upon the platform to drive the horse, on account of the danger of injury to which it would expose him, it would be for the jury to determine whether he knew the danger or was chargeable with negligence in accepting the employment. But we are of the opinion that there was no reasonable ground upon the evidence for saying that the rear platform of the car was an unsafe place to place the boy, or that there was any negligence in placing him upon it to drive the horse. The platform was three feet and more from side to side and was separated from the horse by a dash or guard. If a man or boy should fall from the platform when the car was in motion, he would be in danger of being injured by the car, the platform not being of the same width as the track upon which the car ran. A person standing on the platform might fall from tripping, or from being jostled by persons leaving the car, or by reason of some obstruction on the track with which the car might come in contact, or from other causes which may be easily imagined. But the plain and practical question in this case was, whether any of these occurrences ought reasonably to have been anticipated as likely to happen if the boy should be put upon the platform to drive the horse back to the switch. We perceive no just ground for charging the defendant upon such an hypothesis. It was in no sense the case of putting a child at work upon a dangerous machine without instruction and warning. The plaintiff, as his evidence indicated, and as was stated to the jury, was a bright, intelligent lad, living on the street traversed by the defendant's cars. He was directed by his father to cut the ice from the sidewalk and was engaged in chopping the ice when he was requested by the driver to go upon the platform to drive the horse. The horse so far as appears was tractable, and when he started to drive there was no apparent reason why he would not safely perform the service required of him.

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If the other boys had not got upon the car and commenced swaying it, there is no suggestion that any injury would have happened. It resulted from an unexpected and unanticipated conjunction of circumstances, not attending the ordinary use of the platform. The fact that by reason of the irruption of the boys and their skurrying to get off the car upon the order of the driver, the plaintiff lost his hold upon the reins and he was jostled off the car, does not we think prove or tend to prove that the platform was an unsafe place, or that there was negligence in placing the plaintiff upon it to drive the car, and this as we have said is the negligence charged and upon which the case was submitted to the jury.

Upon the case as presented we are of the opinion that this question of negligence was improperly submitted to the jury and that the order and judgment of the General Term should be reversed and the order of the Special Term granting a new trial should be affirmed, with costs to abide the event.

All concur, except HAIGHT, J., not sitting.

Judgment accordingly.

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ARTHUR HOPSON SAWYER, by Guardian ad Litem, Respondent,  
v. WILLIAM CUBBY et al., Appellants.

A suspension of the power of alienation as to real estate and of absolute ownership as to personal property occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed.

A contingency attached to a legacy which will render it void as an unlawful suspension of the power of alienation, must be one that relates to the person who shall take, and who may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it may happen that there is no one who can alienate within that time.

The will of S. contained a legacy payable to C. in case he paid during the testator's lifetime all assessments, dues and premiums upon any insurance on his life, taken for the benefit of, and payable to, A., his adopted son, and in case such insurance or some part thereof should be actually paid to A. one year from the testator's death. The testator's residuary estate he gave to his executors in trust to pay the income thereof to A. until he arrived

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of this clause, *held*, that the bequest to C., although future and contingent, vested as a right upon the testator's death, and so was alienable by him; that while the trust covered the entire residue except the contingent estate bequeathed to C., and there was a suspension of the power of alienation during the existence of the trust, that the suspension was simply for the life of A. or for a shorter period; and that, therefore, there was no unlawful suspension of the power of alienation, and that the bequest was valid.

*Sawyer v. Cubby* (78 Hun, 298), reversed.

(Argued May 1, 1895; decided May 21, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 21, 1893, which reversed a judgment in favor of defendant entered upon the report of a referee and ordered a new trial.

This action was brought to have the fifth paragraph of the will of Jennie Sawyer, deceased, declared void, and probate of said will, so far as it relates to said paragraph, canceled and revoked, and that William Cubby, the legatee named therein, be adjudged to have failed to perform the conditions of said bequest, and that the executors be enjoined from paying any portion of said estate to said Cubby.

The portions of said will, so far as material, are set forth in the opinion.

*Walter Welch* for appellant. The absolute ownership of such an amount of the estate of the testatrix as equaled the amount of insurance money that was realized by the payment within one year from her death to Arthur Hopson Sawyer, her adopted son, was vested in the defendant immediately upon the death of the testatrix. (*Manice v. Manice*, 43 N. Y. 368; *McKenstry v. Sanders*, 2 T. & C. 181; 58 N. Y. 662; *Embury v. Sheldon*, 68 id. 227; *Livingstone v. Greene*, 52 id. 118; *Mitchell v. Knapp*, 54 Hun, 504; 124 N. Y. 654; *Thompson v. Conway*, 23 Hun, 621; *Martin v. Martin*, 131 Mass. 547; *Lodder v. Hatfield*, 71 N. Y. 92-100; *Underhill v. S. W. R. R. Co.*, 20 Barb. 455, 459; *Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; *In re Toury*, 78 Hun, 521-523;

*Towle v. Palmer*, 1 Robt. 437, 448; *Finley v. King*, 3 Pet. 346; 2 Jarman on Wills [6th ed.], 10; *Thomas v. Howell*, 1 Salk. 170; *Avelyn v. Ward*, 1 Ves. Sr. 422; *Duddy v. Gresham*, 2 L. R. Ir. 442; *Hogan v. Curtin*, 88 N. Y. 162; *People v. Nevin*, 1 Hill, 154-158; *Smith v. Tyler*, 2 id. 648; *Olmsted v. Loomis*, 9 N. Y. 423-434; *Van Rensselaer v. Jones*, 2 Barb. 668; *T. C. Bank v. Bowman*, 43 id. 639-644; *Fitzhugh v. Raymond*, 49 id. 649; *Robinson v. Williams*, 22 N. Y. 380; *Young v. Wilson*, 27 id. 351-353; *U. W. W. Co. v. City of Utica*, 31 Hun, 430; *Lodder v. Hatfield*, 71 N. Y. 92; *In re Young*, 78 Hun, 521; *Territt v. Public Admr.*, 4 Bradf. 245; *Five Points H. of I. v. Ameriman*, 11 Hun, 161; *Caw v. Robertson*, 5 N. Y. 125; *Clancy v. Ogora*, 4 Abb. [N. C.] 268; *Smith v. Edwards*, 23 Hun, 223.) Assuming that the legacy was not vested at the time of the death of the testatrix, yet there was no improper suspension of the absolute ownership of any portion of her estate for a period longer than one life in being at the time of her decease, namely, the life of Arthur Hopson Sawyer. (*Robert v. Corning*, 89 N. Y. 236; *Mattison v. Wheeler*, 11 Hun, 245; *Butler v. Butler*, 3 Barb. Ch. 304; *Post v. Hoover*, 33 N. Y. 593; *Week v. Cornwell*, 104 id. 325, 327; *Roe v. Fingut*, 117 id. 204; *Hillyer v. Vandewater*, 121 id. 681; *Lorillard v. Coster*, 14 Wend. 265; *Everett v. Everett*, 29 N. Y. 39; *McKinstry v. Sanders*, 2 T. & C. 281; *Goebel v. Wolff*, 113 N. Y. 105; *Vanderpool v. Loew*, 112 id. 180; *DuBois v. Ray*, 35 id. 162; *Croak v. County of Kings*, 97 id. 421; *Burt v. Valentine*, 52 Barb. 412; *Paige v. Palmer*, 48 N. H. 440; *Einerson v. Simpson*, 43 id. 475; *Rowlins v. Reilley*, 44 id. 9; *Woodard v. James*, 115 N. Y. 346; *Manice v. Manice*, 43 id. 303; *Heermans v. Robertson*, 64 id. 332.)

*Frank Hopkins* for respondent. Mrs. Sawyer intended that Cubby should have an immediate interest in her estate. No title to a legacy vested in Cubby at Mrs. Sawyer's death. Nothing could vest until the condition precedent—the payments above mentioned—occurred. (*Booth v. Baptist*

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*Church*, 126 N. Y. 215.) The statute requires that the time within which the specified contingency must happen shall be measured by lives — not by any definite time, however short. In the present case this rule is violated. The will provides that the legacy shall vest if the payments are made within a year. (*Rose v. Rose*, 4 Abb. Ct. App. Dec. 108; *Haynes v. Sherman*, 117 N. Y. 433.)

FINCH, J. The General Term have reversed the judgment of the trial court which upheld the legacy in dispute, upon the ground that the bequest, as made in the will, worked a suspension of the absolute ownership of personal property for a longer period than two lives in being. The question is wholly one of construction. With the peculiar and unusual contracts which led to the bequest by the testatrix we have nothing whatever to do except so far as it may possibly throw light upon the testamentary intention. The two clauses in the will out of which the controversy springs are as follows: "Fifth. In the event that William Cubby, of Syracuse, N. Y., shall promptly pay all assessments, dues and premiums which, during my life, shall become due and payable on my insurance on my life, in any insurance company, association or organization, which insurance is or shall be for the benefit of and payable to my adopted son, Arthur Hopson Sawyer, and in the event further that such insurance, or some part thereof shall be actually paid to said Arthur Hopson Sawyer one year from my decease, then, in those events, I give, devise and bequeath to said William Cubby a sum of money which shall be equal in amount to the insurance moneys so paid to said Arthur Hopson Sawyer, not exceeding, however, the sum of \$6,000. Sixth. All the rest, residue and remainder of my property and estate, of every name and nature and wheresoever situated, I give, devise and bequeath unto my executor hereinafter named, in trust, however, to manage, control, hold and keep the same invested in such securities and property as to my executor shall seem proper, and to pay the income therefrom annually or oftener, if it shall seem proper to my

said executor, to my adopted son, Arthur Hopson Sawyer, until he shall arrive at the age of 35 years; and upon his arriving at the age of 35 years to pay, and I direct my said executor to pay, the principal of such rest, residue and remainder over to said Arthur Hopson Sawyer."

Upon these two clauses the General Term held that the legacy to Cubby did not vest in him at the death of the testatrix in possession or in interest, but was a gift both future and contingent. That is probably a correct conclusion, and I shall assume it as the most favorable view for the respondents, and give them the benefit of their contention in that respect. The inference which the General Term drew from the consequent character of the bequest as being both contingent and future is that the ownership is left in abeyance and for a period not measured by lives. I think that is not a correct conclusion. The statutory test of what constitutes a suspension of the power of alienation as to real estate, and of absolute ownership as to personal property, is that it occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed. (*Murphy v. Whitney*, 140 N. Y. 545.) Tried by that test I think we shall find that there never was a moment after the death of the testatrix when a good title in present possession might not have been given to the legacy, and the property covered by it, save only during the continuance of the trust created by the sixth clause. Certainly the interest of Cubby, although future and contingent, vested as a right and so was not inalienable by him, for even in the case of land, expectant estates, which include those which are future and contingent, are declared by the statute to be descendible, devisable and alienable in the same manner as estates in possession. (R. S. part 2, chap. 1, title 2, art. 1, § 35.) Cubby could sell his right at any moment. If he sold to those holding the fee of the land, or the absolute ownership of the personalty, subject to its being in part divested by the happening of the contingency, he with such persons could give a perfect and absolute title, and if he joined with them in the sale the purchaser would have an absolute right of

present possession, save only for the suspension accomplished by the trust. Whether that violated the statute becomes the principal question. The trust covered the entire residue and remainder of the property ; the whole of it except the contingent estate bequeathed to Cubby. The legal estate in that residue vested in the trustee for the purposes of the trust, and since the trustee could not alienate the fund, nor the beneficiary sell his interest, there was of necessity a suspension during the running of the trust ; but that suspension was legal and permissible. The duration of the trust by its very terms was limited to the single life of the adopted son Arthur. The limitation of thirty-five years was of a period less than his life and wholly within it, because the trust ended at Arthur's death whether he lived to the prescribed age or not. If he did, the trust terminated during his life ; if he did not, it ended, nevertheless, upon his death. It was clearly a trust for the life of Arthur or the shorter period within that life of thirty-five years. The trust, therefore, did not create an illegal suspension, and the moment that it should end the whole fund would be alienable by persons in being. Let us make every conceivable supposition. Take it that Arthur dies ten days after testatrix and before any money has been paid him by the insurance company. The trust ends and the entire estate at once passes. If the construction be that Cubby could take nothing because there could be no payment of insurance to Arthur personally and a payment to his representatives would not fulfill the condition, then, the trust having ended and Cubby's expectancy having failed, the entire legal estate in remainder would be vested either in the next of kin of Arthur or the next of kin of the testatrix, and their transfer would pass a complete and perfect title and a present right of possession. If we say that Cubby's right could survive the death of Arthur before payment made, then a transfer by him joining that by the next of kin either of Arthur or of the testatrix would again pass a complete and present right. For at the end of the trust the property, subject to Cubby's right in it, would necessarily pass, either by the will to Arthur on his

reaching the age of thirty-five, or if he should die earlier would go by his will or descend by the Statute of Distributions in case of his intestacy to his next of kin on one theory, and to the next of kin of the testatrix on another. We should regard Arthur's estate as vested and its enjoyment only postponed, since the whole accruing interest is given him, in which event his death before the age of thirty-five would end the trust and vest the property in his legatee or next of kin. Even if it be possible to say that he took no vested estate, but only one conditioned upon his reaching the prescribed age, then his earlier death would again end the trust and the property vest at once in the next of kin of the testatrix, who would take as the result of partial intestacy following the lapsed bequest to Arthur. So that upon his death, whenever occurring, it inevitably results that a joint transfer by Cubby and by the next of kin either of Arthur or of testatrix, as the construction might be settled, would pass the entire and absolute ownership of the trust fund. Indeed, Cubby's legacy never went into the trust at all. The moment the contingency of payment happened the legacy vested in him absolutely and escaped any control of the trust. If such contingency did not happen, then there would be no legacy, and his rights would disappear. The test is the inquiry whether always and at any moment after the termination of the trust there were absolute owners of the property who could transfer a good title. The suggestion, seriously argued and deemed important, that the condition of the legacy requiring within a year payment of insurance to Arthur should be construed as if it read to him and to his heirs and assigns, and that the condition might not be fulfilled within two lives in being, is totally immaterial, for it does not at all follow that a suspension of ownership resulted. The contingent character of the estate is one thing: its alienable or inalienable character is quite another. It is not every contingency which works the latter result. The interjected words would not make the legacy inalienable. Cubby could sell it; his assigns could sell it if he transferred it to them; his next of kin or legatees could do so



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if he died. The mistake of the decision is in construing a contingency dependent upon a future event which may or may not occur as necessarily making the legacy inalienable. It does not do so. The contingency which works that result is one relating to the persons who shall take, and who either may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it happens that there is no one who can alienate. Here, at the moment of the ending of the trust there always are or will be ascertained persons in being who, grouped together, have the absolute ownership and can sell, and so there is thereafter no suspension. The suspension worked by the trust is for one life or a shorter period. At its termination there is no further suspension, but the absolute ownership vests at once in Arthur or his representatives, and Cubby and these joining can at once transfer an absolute and present ownership.

The cases cited on behalf of the respondents do not hold any different doctrine. In one there was a legacy to a corporation not existent or in being, and to a church upon a special trust to pay off a mortgage where the legacy was necessarily made inalienable in the hands of the legatee. (*Booth v. Baptist Church*, 126 N. Y. 215.) In another the corporate legatee had not come into being, and the executors held in trust. (*Rose v. Rose*, 4 Abb. Ct. App. Dec. 108.) In a third there was, first, a trust and then a devise to those who at the death of the widow should prove to be testator's living heirs. (*Haynes v. Sherman*, 117 N. Y. 433.) By these cases it is established that a contingency which results in there being no person in existence or capable of taking or of alienating who is yet the intended legatee does work a suspension of ownership since there is no one to give a complete title. That is not the case here. The contingency is an event and not dependent upon the existence or capacity of a person. The true construction of the will is that Arthur had a vested interest in the residue and remainder, subject to the trust and to the contingent right of Cubby, and at Arthur's death whenever occurring, the suspension caused by the trust would end

and the residue vest at once in his next of kin, subject only to Cubby's right. If he released to them they would have the absolute ownership. If he joined them in a sale, the purchaser would have a complete and perfect title.

The judgment of the General Term should be reversed and that of the trial court affirmed, with costs.

All concur.

Judgment accordingly.

146	200
158	858

146	200
170	*279
171	*128

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EDMUND W. CONVERSE et al., Appellants, v. DANIEL E. SICKLES, Sheriff, etc., Respondent.

Where a sale of goods on credit has been induced by fraud on the part of the purchaser, the vendor may, on discovery of the fraud, disaffirm the sale and follow the proceeds of the goods in the hands of a sheriff, who has levied upon and sold them by virtue of an execution against the purchaser.

The question of *res adjudicata*, estoppel or a bar, by reason of a former judgment cannot be disposed of on the judgment alone, but is to be determined by the judgment roll.

Defendant, a sheriff, under executions against F. R. & Co., levied upon certain goods which had been sold on credit by plaintiff to that firm. Plaintiff, claiming that the sale was induced by fraud, disaffirmed the sale, and brought an action of replevin to recover the goods. On trial of said action plaintiffs' counsel, in his opening, stated that he was unable to show that a demand upon defendant for a return of the goods was made and refused, and conceded that the goods had been taken by plaintiffs and disposed of. Thereupon, on motion of defendant's counsel, a verdict was rendered for defendant for a return of the goods, and assessing their value at a sum agreed upon. Judgment was entered and plaintiffs paid the amount thereof, but served on defendant a demand in writing for a return of the money, which they claimed as the proceeds of goods obtained from them by fraud. On refusal to return, this action was brought, plaintiffs claiming to charge defendant as trustee for the proceeds of their goods in his hands, and asking for an accounting and payment over of such proceeds. *Held*, that the judgment in the replevin suit was not conclusive against plaintiffs, either as *res adjudicata*, estoppel or a bar; that the decision was in effect simply that the action was prematurely brought, and there was no adjudication on the merits.

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Also, *held*, that it was immaterial that the moneys paid over to the sheriff were not the identical moneys received by plaintiffs for the goods; that as they were paid over as the proceeds they were to be so regarded.

*Converse v. Sickles* (74 Hun, 429), reversed.

(Argued May 2, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 1, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Frederic R. Kellogg* for appellants. The principle that money paid under a valid judgment cannot be recovered back, though not justly due to the judgment creditor, only applies to cases in which the judgment is *res judicata* upon the questions sought to be raised in the second suit. (Cobbey on Replevin, §§ 1105, 1111, 1118, 1162, 1163; Wells on Replevin, § 494; *Fleet v. Lockwood*, 17 Conn. 240; *F. Ins. Co. v. Robinson*, 82 Penn. St. 359; *F. Ins. Co. v. Heath*, 95 id. 340; *Greenbaum v. Lloyd*, 60 Mo. 25; *Marriott v. Hampton*, 7 Term Rep. 269; *Nettleton v. Beach*, 107 Mass. 500; *McMurtie v. Keenan*, 109 id. 186; *Weeks v. Thomas*, 21 Maine, 465; *Roberts v. Norris*, 67 Ind. 352; *Walbridge v. Shaw*, 7 Cush. 560; *Crosby v. Baker*, 66 Allen, 295; *Moreton v. Sweetser*, 12 id. 137; *Terryll v. Bailey*, 27 Minn. 304; *Armel v. Layton*, 33 Kans. 41; *Landers v. George*, 49 Ind. 309; *Fishli v. Fishli*, 1 Blackf. 360; *Voge v. Breed*, 14 Bradw. 538.) The judgments in favor of the defendant in the prior replevin suits are not a bar to the litigation, in this action, of the questions of fraud and rescission. (*Lorillard v. Clyde*, 122 N. Y. 47; *Pray v. Hegeman*, 98 id. 358; *Bell v. Merrifield*, 109 id. 210; *Maloney v. Horan*, 49 id. 111; *Dunham v. Bower*, 77 id. 79; *Shaw v. Broadbent*, 129 id. 123; *Cromwell v. Sac Co.*, 94 U. S. 352; *Marsh v. Master-ton*, 101 N. Y. 407; *Spelman v. Terry*, 74 id. 451; *Webb v.*

*Buckalew*, 82 id. 559; *Carmony v. Hooper*, 5 Penn. St. 305; *Gould v. E., etc., R. R. Co.*, 91 U. S. 533; *Rose v. Hawley*, 133 N. Y. 321; *Quackenbush v. Ehle*, 5 Barb. 473; *Dean v. Reed*, 37 Hun, 598; *Sheldon v. Edwards*, 35 N. Y. 287; *Daggett v. Robbins*, 2 Blackf. 415; *Roberts v. Norris*, 67 Ind. 352; *Walbridge v. Shaw*, 7 Cush. 560; *Crosby v. Baker*, 66 Allen, 295; *Morton v. Sweetser*, 12 id. 137; *Terryll v. Bailey*, 27 Minn. 304; *Armel v. Layton*, 33 Kans. 41; *Landers v. George*, 49 Ind. 309; *Unglisch v. Marvin*, 128 N. Y. 386; 1 Freem. Judg. §§ 273, 274; *Higgs v. Wells*, 12 Barb. 569; *Phillips v. Berrick*, 15 Johns. 137; *P. Co. v. Sickles*, 24 How. [U. S.] 333; Code Civ. Pro. §§ 1209, 1730; Wells on Replevin, § 494; *Fleet v. Lockwood*, 17 Conn. 240; *Lowe v. Higham*, 3 Allen, 430; Cobbey on Replevin, §§ 1105, 1111, 1118; *Warner v. Mathews*, 18 Ill. 83.) The payment of the money in question by the plaintiffs to the defendant in satisfaction of the replevin judgments was not voluntary. (*Bank v. Mayor, etc.*, 43 N. Y. 188; *Lott v. Sweeney*, 29 Barb. 93; *Peyser v. Mayor, etc.*, 70 N. Y. 501; *Phelps v. Mayor, etc.*, 112 id. 216; *Vaughan v. Portchester*, 48 N. Y. S. R. 436; *Wheeler v. Ruckman*, 51 N. Y. 391.) The purchases of the goods in question from these plaintiffs by Feckheimer, Rau & Co. were induced by gross fraud and deceit. (*Rice v. Manley*, 76 N. Y. 87; *Eaton v. Avery*, 83 id. 34; *Cowin v. Call*, 21 Pick. 523; *Brackett v. Griswold*, 112 N. Y. 467; *Wakeman v. Dalley*, 51 id. 27; *Hammond v. Pennock*, 61 id. 150; *Spalding v. Keyes*, 125 id. 13; *Carey v. Hotelling*, 1 Hill, 316; *Miller v. Barbour*, 66 N. Y. 568.) Where the legal title to property is obtained by fraud, the fraudulent vendee, or any person obtaining the property or its proceeds other than a *bona fide* purchaser for value without notice, is chargeable in equity as a constructive trustee thereof, for the benefit of the individuals defrauded. (1 Perry on Trusts, § 166; *Ins. Co. v. Roulet*, 7 Paige, 567; 2 Story's Eq. Juris. §§ 1258, 1265; *Cavin v. Gleason*, 105 N. Y. 256; *Bank v. King*, 57 Penn. St. 302; *Bank v. Ins. Co.*, 104 U. S. 69; *Knatchbull v. Hallett*, L. R. [13 Ch. Div.]

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696; *Ferris v. Van Vechten*, 73 N. Y. 113.) The sheriff actually obtained possession of the property sold to Fecheimer, Rau & Co. by these plaintiffs, and also of its proceeds, and became a trustee thereof for the benefit of these plaintiffs. (*Van Allen v. Bank*, 52 N. Y. 1; *Ferris v. Van Vechten*, 73 id. 113; *Frank v. Bingham*, 58 Hun, 582; *Cavin v. Gleason*, 105 N. Y. 256; *People v. Bank*, 39 Hun, 190; *McCall v. Fraser*, 40 id. 113; *Baker v. Bank*, 100 N. Y. 31; *Bank v. Peters*, 123 id. 278; *Rabel v. Griffin*, 12 Daly, 248; *Bank v. Ins. Co.*, 104 U. S. 66; *Bank v. King*, 57 Penn. St. 202.) These plaintiffs, although not the real owners of the goods at the time of making the sales, nevertheless became subrogated to all rights of the original manufacturers, and are endowed with full power to prosecute this action. (*Bank v. Ins. Co.*, 104 U. S. 66; *Brown v. Howck*, 41 Hun, 18.) The possibility that plaintiffs would have a remedy at law in an action in the nature of money had and received does not oust this court of its jurisdiction. (1 Pom. Eq. Juris. § 278; 2 Story's Eq. Juris. 1256; *Ins. Co. v. Roulet*, 7 Paige, 567; 24 Wend. 518; *Roberts v. Ely*, 113 N. Y. 132.)

*Alex. Blumenstiel* for respondent. The judgments obtained by the defendant against the plaintiffs in the replevin suits constitute a complete bar to any recovery of the plaintiffs in this action. (Code Civ. Pro. § 1209; *Stowell v. Chamberlain*, 60 N. Y. 277; *Porter v. Kingsbury*, 77 id. 154; *McKnight v. Dunlap*, 4 Barb. 36; *Manning v. B. & S. A. R. R. Co.*, 18 Civ. Pro. Rep. 40; *Place v. Harwood*, 117 N. Y. 491; *Gooble v. Iffla*, 111 id. 170; *Pray v. Hegeman*, 98 id. 351; *Kenny v. Apyar*, 93 id. 539; *Moeschler v. Lochte*, 12 N. Y. S. R. 855; *Angell v. Hollister*, 38 N. Y. 378; *Yates v. Fasset*, 5 Den. 21; *Lorillard v. Clyde*, 122 N. Y. 47; *Bell v. Merrifield*, 109 id. 202.) The question of duress in paying the judgment does not arise. (*Skeate v. Beale*, 11 Ad. & El. 983; *Wilcox v. Howland*, 23 Pick. 167; *Kraemer v. Denterman*, 35 N. W. Rep. 276; *Rudich v. Hutchins*, 95 U. S.

210; *T. Ins. Co. v. Heath*, 95 Penn. St. 333; *Scholey v. Halsey*, 72 N. Y. 578; *Goodwin v. Wertheimer*, 99 id. 149; *Griswold v. Burroughs*, 39 N. Y. S. R. 768.) The moneys paid in satisfaction of the judgments were not clothed with any trust in favor of the plaintiffs. (*Wise v. Grant*, 140 N. Y. 593-597; *Goodwin v. Wertheimer*, 99 id. 149; *Griswold v. Burroughs*, 39 N. Y. S. R. 768; *A. S. R. Co. v. Fancher*, 81 Hun, 56; *Cavin v. Gleason*, 105 N. Y. 256.) The money paid was not the proceeds of the property replevied from the sheriff. (29 N. E. Rep. 493.) There was not sufficient proof to establish fraud or wrongful taking by Fechheimer, Rau & Co. (*Brackett v. Griswold*, 112 N. Y. 454; *Schultz v. Hoagland*, 85 id. 464; *Morris v. Tolcott*, 96 id. 100; *Coffin v. Hollister*, 124 id. 644; *Hotchkiss v. T. A. R. R. Co.*, 127 id. 329; *Baird v. Mayor, etc.*, 96 id. 567.)

HAIGHT, J. This action was brought to charge the defendant, as a trustee for the benefit of the plaintiffs, with the sum of \$5,312.99, as the proceeds of certain merchandise alleged to have belonged to the plaintiffs, but wrongfully detained by the defendant.

The plaintiffs claimed that they were induced by fraud and deceit to sell and deliver the goods in question to the firm of Fechheimer, Rau & Co., and that shortly thereafter the same were seized by the defendant, who claims to have levied thereon by virtue of executions issued to him by judgment creditors of the firm; that the plaintiffs immediately after the discovery of the fraud practiced upon them disaffirmed the contract of sale and replevied the goods, which they subsequently disposed of. Two actions in replevin were commenced. A portion of the goods were taken in one action and the remainder in the other. When one of the actions was brought to trial the plaintiffs' counsel, in his opening, stated "that he was unable to show that prior to the commencement of the action a demand was made upon the sheriff for a return of the goods, and that the same was refused, and conceded that the goods had been taken by the plaintiffs and

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disposed of." The court thereupon, on motion of the defendant, directed a verdict for the sheriff for the return of the goods, and assessed the value at an amount agreed upon. Similar direction was made in each action, varying only in amounts. No evidence was taken upon the trial of either action; the verdicts being directed solely upon the plaintiffs' opening in each case. A stay of execution upon the judgments was ordered until July 12, 1892, at which time the plaintiffs being advised that it was hopeless to prosecute an appeal, paid the amounts to the sheriff as they claimed under duress of judgment, at the same time demanding from the sheriff in writing the return of the money as the proceeds of the goods which they claimed had been procured from them by the fraud and deceit of Fechheimer, Rau & Co. The sheriff having refused to return the money, this action was brought. Upon the trial the court found as a conclusion of law that the judgments in the two replevin actions are binding adjudications against the right of the plaintiffs to maintain this action, and constitute effectual bars to the same, and that the money paid over to the defendant in satisfaction of those judgments was not, therefore, impressed with any trust in favor of the plaintiffs.

If this case is to be treated as an action to recover back the amount paid in satisfaction of the two judgments entered in the replevin actions, it cannot be maintained for reasons well stated in the opinion delivered by the General Term. But such we do not understand to be the character of the action. In the demand made upon the defendant for the money paid over, it was stated that it represented the proceeds and value of the goods which were obtained from the plaintiffs by Fechheimer, Rau & Co. by fraud and deceit, and to which neither Fechheimer, Rau & Co., nor the sheriff, nor the parties he represents, had any right or color of right. In the complaint this fund was alleged to be the proceeds of the goods which had been procured from the plaintiffs by Fechheimer, Rau & Co. by fraud and deceit, and with intent on the part of Fechheimer, Rau & Co. not to pay therefor; that the same had

been demanded from the defendant, and the notice before mentioned served upon him. The complaint then proceeds: "That the said defendant still holds and retains the said sum; that said demand has been wholly refused, and no part of said sum has been paid to said plaintiffs, and that by reason of the foregoing facts the above-named defendant holds the said sum as trustee for these plaintiffs, and the plaintiffs are entitled to compel the said trustee to account to said plaintiffs for the full value and proceeds of the said goods, together with interest thereon as aforesaid, which said value, with interest thereon up to July 12, 1892, amounts to the sum of \$5,312.99, and that the said defendant be compelled to pay over the whole of said sum for which he may be accountable to the said plaintiffs." The complaint then concludes with the following demand for judgment: "Wherefore, plaintiffs demand judgment against the said defendant, that he be compelled to account to the said plaintiffs for the full value of the said goods and proceeds, with interest thereon as aforesaid, and that he be compelled to pay over to the said plaintiffs the full sum with which he may be found accountable, and for such other and further relief as may be just." It thus appears to us that this action was brought to recover the proceeds derived from the sale of the goods which it is alleged were procured from the plaintiffs by Fechheimer, Rau & Co. through fraud and deceit, without intention to pay therefor, which proceeds are now in the hands of the defendant as sheriff. That such proceeds can be followed into the hands of a sheriff, or of an assignee for the benefit of creditors, is now too well settled to admit of question. (*Am. Sugar Refining Co. v. Fancher*, 145 N. Y. 552.)

It is contended, however, that the judgments in the replevin actions are estoppels, *res adjudicata* and a bar to the litigation in this action of the question of fraud and rescission. As we have seen, there was no trial of those issues in those actions. The verdict was directed by the court upon the motion of the defendant, based upon the statement of the plaintiffs' counsel in his opening that no demand had been made upon the



defendant for a return of the goods before the actions were brought. Such a demand was necessary. (*Goodwin v. Wertheimer*, 99 N. Y. 149.) The actions were, therefore, prematurely brought, and were disposed of upon that ground without a consideration of the issues now raised, or an opportunity given to be heard with reference thereto. There was no trial or adjudication upon the merits. There is no mention of the merits in the judgments entered. The only expression that appears having any bearing upon that subject is the recital that the jury had duly rendered a verdict in favor of the defendant. This does not conclude the parties. Under the circumstances it is in effect nothing more than a non-suit. The questions of estoppel, *res adjudicata* or bar, cannot be disposed of from the judgment alone. These questions have to be determined from the judgment roll, composed of the pleadings, the clerk's minutes of the trial and the judgment. The pleadings disclose the subject-matter in litigation and the issues formed, the minutes of the clerk, the proceedings had upon the trial and the judgment, the award made thereon. A knowledge of the subject-matter, issues formed, proceedings had and determination made, is essential in order to determine whether a party has had a day in court with a hearing as to the merits of his controversy. There are many cases in which close distinctions have been made upon the subject of *res adjudicata* as applied to second suits, but in support of our views we deem it unnecessary to here refer to more than the general principles recognized by the cases.

Freeman, in his work on Judgments, at section 263, upon the authority of Smith's Leading Cases, divides judgments which are not a bar to another action, because not on the merits, into the following classes: "1. Where the plaintiff fails for want of jurisdiction in the court to hear his complaint or to grant him relief. 2. Where he has misconceived his action. 3. Where he has not brought the proper parties before the court. 4. Where the decision was on demurrer and the complaint in the second suit sets forth a cause of action in proper form. 5. Where the first suit was *prematurely* brought.

6. Where the matter in the first suit is ruled out as inadmissible under the pleadings." At section 260 he says: "The estoppel arising from a judgment or decree is not odious because it is confined to those points which either were in fact litigated and determined between the parties, or which were determined in the absence of any actual contest, but not until after a full legal opportunity was given both parties to make such contest as they might deem proper. It follows from this that no judgment can be available as an estoppel unless it is a judgment on the merits." And at section 272 he says: "A judgment of a court possessing competent jurisdiction is final, not only in reference to the matters actually or formally litigated, but as to all other matters which the parties might have litigated and have decided in the cause."

In *Marsh v. Masterton* (101 N. Y. 401-407) it is said that, "in order to bar the second action, the circumstances must be such that the plaintiff might have recovered in the first for the same cause alleged in the second. The estoppel of an adjudication made on grounds purely technical, and where the merits could not come in question, is limited to the point actually decided and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first. When a suit fails in consequence of a want of jurisdiction, or because the plaintiff misconceives the remedy, or did not bring the proper parties before the court, and not from any inherent defect, the substance of the cause is left at liberty and may be made the subject of another action. To render a judgment effectual as a bar, the cause of action must be substantially the same."

In *Shaw v. Broadbent* (129 N. Y. 114-123) RUGER, Ch. J., says: "In order that the judgment should have the effect claimed, it is not enough that the party produce a record showing a judicial determination of the same question litigated in his favor, but it must also appear that it was rendered upon the merits upon a material point and substantially upon the same facts presented in the subsequent case."

In *Rose v. Hawley* (141 N. Y. 366-375) it is said: "Where

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a party has been defeated in his action by reason of neglect to perform some *preliminary* act necessary to perfect the cause of action, such as the giving of notice or the like, the judgment is not a bar to another action begun after the cause of action has become perfected by the giving of notice, or the performance of the requisite preliminary act, whatever it may be."

In *Appleby v. Astor Fire Ins. Co.* (54 N. Y. 253-261) it is said *per curiam* that "there was no motion for a non-suit, but the court upon the whole case was requested to direct a verdict for the defendant. We are of the opinion that this request was in substance and effect the same thing as a non-suit." (See, also, *Spelman v. Terry*, 74 N. Y. 451; *Webb v. Buckelew*, 82 id. 559; *Pray v. Hegeman*, 98 id. 358, and *Bell v. Merrifield*, 109 id. 210.)

It is now urged that the money in the hands of the sheriff sought to be recovered is not shown to be the proceeds of the goods procured by Fechlheimer, Rau & Co. from the plaintiffs. Some of it may be money paid for costs, etc., in the replevin actions, but as to the greater portion we think it must be regarded as the proceeds of the goods. It was paid over to the sheriff as such. The plaintiffs disposed of the goods whilst they were in their hands, pending the determination of the replevin actions. Money has no earmarks, and it makes no difference whether the identical money received by the plaintiffs for the goods was paid over to the sheriff or other money substituted in its place, as long as it was paid over as the proceeds of the goods.

The trial court refused to pass upon the question of fraud and deceit or to make findings upon that subject. We do not deem it advisable to now indulge in any expressions of opinion in reference thereto. The evidence upon that subject calls for the careful consideration of the trial court, and the issues raised by the pleadings should be determined by it.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except GRAY, J., not voting.

Judgment reversed.

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THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF  
NEW YORK, Respondent, v. THE NEW YORK REFRIGER-  
ATING CONSTRUCTION COMPANY et al., Appellants.

While the general rule is that, where a contract is rescinded while in the course of performance, no claim in respect of performance may thereafter be made, it does not apply where, by the agreement of rescission, the claim has been expressly or impliedly reserved.

Defendant, the N. Y. R. C. Co., being the highest bidder, was awarded the privilege of introducing its refrigerating apparatus in one of the New York city markets, and entered into a contract with the city, by which it agreed, among other things, to pay to the city a specified sum annually, the payments to be made quarterly. A bond was furnished by the company upon which the other defendants were the sureties. The recital in the bond referred to the contract which was attached, and it was conditioned for the performance of "each and every condition therein contained." In an action to recover two quarterly payments alleged to be due on the contract, *held*, that the recital was broad enough to cover the condition, and to render the sureties liable if a breach was established.

The contract provided that, in case of non-performance by the company, certain prescribed proceedings might be taken, and, after a hearing therein, the city comptroller, upon direction of the commissioner of the sinking fund, was vested with power to notify the company to discontinue its system. After the commencement of this action such proceedings were instituted, and at the termination thereof the comptroller, by direction of the commissioners, notified the company to discontinue and that the contract was canceled and annulled. Defendants claimed that this cancellation destroyed the cause of action. *Held*, untenable; that it was not a rescission in the strict technical sense which destroys all right of action, but simply a termination of the contract according to its terms, which left undisturbed all existing liabilities.

The complaint alleged that the payments sought to be recovered were due February 1 and May 1, 1891. By the contract the payments were not due in advance. The testimony on the part of plaintiff was to the effect that the payments unpaid were for the quarter from February 1 to May 1, and from May 1 to August 1. The trial court found that defendant had not paid the payment for the quarter ending February 1, 1891. *Held*, that while there was no proof to sustain this finding, yet as it appeared that two quarterly payments were in fact due and unpaid, it was incumbent on defendant to raise the specific objection on the trial, and, as this was not done, it could not be raised upon appeal.

(Argued May 2, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14, 1894, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Burton N. Harrison* for appellants. A complete defense for the three individual defendants, the three sureties in the bond sued on, is found in the fact that the complaint does not charge any default of the defendant company, the principal in the bond, as to any matter for which the securities in the bond became thereby bound. (*N. M. B. Assn. v. Conkling*, 90 N. Y. 120; *Wood v. Fisk*, 63 id. 250; *McCluskey v. Cromwell*, 11 id. 598; *Gates v. McKee*, 13 id. 237; *W., etc., Co. v. Clinton*, 66 id. 331; *Miller v. Stewart*, 9 Wheat. 702; *U. S. v. Boyd*, 15 Pet. 208; *Birckhead v. Brown*, 5 Hill, 640; *Ward v. Stahl*, 81 N. Y. 408.) The supplemental answer alleges, the evidence proves, and the findings show, a complete defense, not only for the three sureties in the bond, but also for the defendant corporation — the latter the principal in the bond sued on. (*McCreery v. Day*, 119 N. Y. 1; *O. P. R. R. Co. v. Forrest*, 128 id. 91; *People v. Vilas*, 36 id. 400; *Hughson v. City of Rochester*, 49 Hun, 51; *McCotter v. Hooker*, 8 N. Y. 507; *Ex parte McCardle*, 7 Wall. 506; *Butler v. Palmer*, 1 Hill, 328; *Hinsdale v. White*, 6 id. 507.) The statute under which the comptroller proceeded authorized him to adjust, as he did, the claims for and against the city by canceling and annulling the agreement of May 15, 1890. (Laws of 1849, chap. 187, § 11; Laws of 1857, chap. 446, § 22; Laws of 1873, chap. 335, § 29; Laws of 1882, chap. 410, § 123.) The opinion of the learned justice below, that the cancellation and annulment of the agreement of May 15, 1890, should be construed to be merely the notice by the instrument of May 15, 1890, provided for, notifying the defendant company to discontinue its operations

for the future, and to remove its apparatus from the market, is untenable. (Laws of 1882, chap. 410, § 123; *Mansfield's Case*, 102 N. Y. 205; *Hughson v. City of Rochester*, 49 Hun, 52.)

*D. J. Dean* for respondent. The omission of the common council to act upon the company's application for a permit affords no defense to this action. (*Stewart v. Keteltas*, 36 N. Y. 388; *Dannat v. Fuller*, 120 id. 554; *Patterson v. O'Hara*, 2 E. D. Smith, 58; *Brewer v. Knapp*, 1 Pick. 332; *Davis v. Tyler*, 18 Johns. 489; *Lawson's Pres. Ev.* 350, D; *Decker v. Livingston*, 15 Johns. 479; *Weeks v. Little*, 89 N. Y. 566; *Mansfield v. N. Y. C. & H. R. R. Co.*, 102 id. 205; *Barr v. N. Y., L. E. & W. R. Co.*, 125 id. 263; *Mayor v. N. B. Bank*, 126 id. 665.) The common council of the city of New York is a legislative body, its acts involve the exercise of discretion and impute no liability to the city. (Laws of 1882, chap. 410, §§ 29, 86; *Schanck v. Mayor, etc.*, 69 N. Y. 444; *People ex rel. v. Grant*, 126 id. 473; *N. Y. & H. R. R. Co. v. Mayor, etc.*, 1 Hilt. 562; *Child v. Boston*, 4 Allen, 41; *E. R. G. L. Co. v. Donnelly*, 93 N. Y. 557; *Mathewson v. Grand Rapids*, 50 N. W. Rep. 651; *Hassett v. McArdle*, 7 Misc. Rep. 710; *Jones v. Judd*, 4 N. Y. 412; *Heine v. Myer*, 61 id. 171.) Even conceding that the city was under an obligation to procure the permit for the defendant company, and that the procuring of the permit was a condition precedent to the maintenance of an action for the rent, it is submitted that such condition precedent has been waived. (*White v. Beeten*, 7 H. & N. 40; *Behn v. Burness*, 3 B. & S. 751; *Pust v. Dowie*, 5 id. 20; *Jonassohn v. Young*, 4 id. 296; *M. D. Foundry v. Hovey*, 21 Pick. 417; *Norrington v. Wright*, 115 U. S. 188; *M. F. & M. Co. v. Lorentz*, 44 Md. 218; *Sampson v. S. I. W. Co.*, 6 Gray, 120; *Kenworthy v. Stevens*, 132 Mass. 125; Benjamin on Sales [4th Eng. ed.], 547; *Leake on Cont.* 664; *Wiley v. Athol*, 150 Mass. 426.) The defendants' construction of the agreement with regard to payments is totally at variance

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with its true intent and meaning. (*Langdon v. Mayor, etc.*, 93 N. Y. 129, 145; *Mayor v. D. D., E. B. & B. R. R. Co.*, 47 Hun, 199; 112 N. Y. 137.) The practical construction placed upon the agreement by the defendants is binding upon them. (*Powers v. Athens*, 26 Hun, 287; 99 N. Y. 592; *Fort v. Burch*, 6 Barb. 60-73; *Du Bois v. Brown*, 1 Dem. 317; *Miller v. Eheinweig*, 79 Hun, 1; *McKeen v. Delancey*, 5 Cranch, 22; *Vincennes v. C. G. L. Co.*, 31 N. E. Rep. 573; *Easton v. Pickersgill*, 55 N. Y. 310.) The resolution of the sinking fund operated prospectively, and has no retroactive effect. (Laws of 1882, chap. 410, §§ 123, 170; *Kingsbury v. Westfall*, 61 N. Y. 356; *Kingsbury v. Williams*, 53 Barb. 142; *Gelpcke v. Quentell*, 74 N. Y. 599; *Roe v. Conway*, Id. 204; *Johnson v. Oppenheim*, 55 id. 280.) The bond is not defective in that the names of the sureties are not inserted in the body of it. (21 Am. & Eng. Ency. of Law, 449; Brandt on Suretyship, 15; *Fulton's Case*, 7 Cow. 484.) The defendant company is a proper party to the suit on the bond. (Code Civ. Pro. § 454; *Viadero v. Morton*, 6 Civ. Pro. Rep. 238; *Field v. Van Cott*, 5 Daly, 308.)

BARTLETT, J. This is an appeal from a judgment of the General Term, first department, affirming a judgment in favor of plaintiff.

This action is brought to recover under a written agreement and a bond executed in pursuance thereof.

The corporation defendant executed the agreement with the city of New York, and the individual defendants are the sureties on the bond.

The refrigerating company, as the highest bidder, was awarded the privilege of introducing its refrigerating apparatus in the new West Washington Market, paying therefor five per cent of the gross receipts from the standholders in the market, and the additional sum of fifty-five hundred dollars yearly, payable quarterly.

The agreement required the refrigerating company to give a bond, in the penal sum of ten thousand dollars, for the

faithful performance of the terms of the agreement, with two sureties.

The bond was duly furnished by the refrigerating company, with three sureties, the individual defendants.

This action is brought to recover two quarterly payments of \$1,375.00 each, alleged to be due under the contract, February 1st and May 1st, 1891, respectively.

It is stipulated that a second pending action shall abide the result of this one.

Several defenses are pleaded by the defendants.

It is insisted that the recital of the bond is not broad enough to cover the condition, and, as a result, that the sureties are not liable in this action.

The recital refers to the written contract which is attached to the bond; the condition requires a performance of the contract in "each and every provision therein contained," and it is clear that the sureties are liable if a breach is established.

It is argued that a surety is never to be implicated beyond his specific engagement, and that his liability is always *strictissimi juris*, and must not be extended by construction.

While this rule is well settled and the courts uniformly enforce it, the case at bar presents no violation.

It is further urged that the contract has been canceled and annulled by the parties, and that an action cannot be founded thereon.

We have been referred to numerous authorities laying down the general doctrine that where a contract is rescinded while in the course of performance, no claim in respect of performance, or of what has been paid or received thereon, may thereafter be made.

This general rule is subject, however, to the qualification that any claim founded on the contract must be referred to the agreement of rescission, to ascertain whether it has been expressly or impliedly reserved. (*McCreery v. Day*, 119 N. Y. 5.)

In the case cited Judge ANDREWS says that the liability of Garrison "depends on the intention to be deduced from the



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agreement of annulment, construed in the light of attending circumstances."

In the case at bar we must apply this principle of construction, as it would be unjust to enforce a hard and fast rule without regard to the situation of the parties and the circumstances that induced the city of New York to terminate the contract.

The fifth subdivision of the contract provides the mode of procedure in case of non-performance by the refrigerating company. The comptroller was to certify the fact in writing to the commissioners of the sinking fund and the company afforded an opportunity to be heard in reply to the charges, and after the hearing the comptroller, upon the direction of the commissioners, was vested with the power to notify the company to discontinue its system.

This provision of the contract was invoked by the city, the company failed to appear before the commissioners in answer to the charges preferred by the comptroller, and the latter, by direction of the commissioners, notified the company to discontinue its system and that its contract was canceled and annulled.

At the time this occurred these actions were pending to recover payments due under the contract, and yet the appellants contend that it was the intention of all the parties to the contract to effect a strict rescission leaving the situation precisely as if no contract had ever existed.

In view of the *status* when the comptroller, acting under the direction of the commissioners of the sinking fund, served his final notice, we think it was not a rescission in the strict technical sense which destroyed all rights of action, but was a termination of the contract according to its terms and left undisturbed all existing liabilities; the rescission had no retroactive effect. This result is to be fairly implied from all the surrounding circumstances and carries out the obvious meaning of the parties when the contract was executed.

The position assumed by the appellants is technical, forced and unnatural.

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ROBERT M. OLIPHANT et al., as Executors, etc., Respondents,  
v. EDWARD BURNS et al., Impleaded, etc., Appellants.

In October, 1870, H. was the owner of a tract of land subject to a purchase-money mortgage; he conveyed a portion thereof to a seminary, and C., the mortgagee, before the conveyance, executed to H. a release, absolute in its terms, of that portion from the lien of the mortgage. The deed of H. stated that the land was granted on the condition that it should be kept and used as a theological seminary; the grantee covenanted that it would, within five years, erect buildings on the premises for that purpose, and, in case of default, would, upon request, re-convey to H. In April, 1871, H., his wife and C. entered into a contract by which it was agreed that the land covered by said mortgage, except that portion to which the seminary "may retain title," and also other lands owned by H. and wife, should be sold off in lots and the purchase money divided between the parties in specified proportions. In June, 1871, H. conveyed certain other portions of the tract to W., which was also released by C. from the purchase-money mortgage. In May, 1873, the seminary re-conveyed to H. the land so conveyed to it by him, and in June, 1879, W. re-conveyed to H. the portion so conveyed to him. Thereafter H. and wife executed to M., the original plaintiff herein, two mortgages on the portions so re-conveyed to him by the seminary and W. In an action to foreclose said mortgages defendants claimed that by reason of the covenant for re-conveyance in the deed to the seminary the land conveyed, upon being re-conveyed to H., became subject to the agreement and subject to be sold under its provisions, and although M. had no actual notice of the agreement that the record thereof was constructive notice; and so, that she took her mortgage subject to the rights of third parties provided for in the agreement. *Held*, untenable.

*Tefft v. Munson* (57 N. Y. 97) and *White v. Patten* (24 Pick. 324), distinguished.

In July, 1880, an action was brought by the executors of C. against H. and others to enforce specific performance of the said agreement. The complaint, in describing the property to be affected, excluded the parcels sold to the seminary and to W. M. was made one of the defendants. She appeared and set up the releases, and thereupon, by consent, the complaint was dismissed as to her. The judgment therein, to which none of the remaining defendants appeared to have raised any objection, directed the sale of the seminary parcel with the land described in the complaint. After the commencement of the action, but before entry of judgment therein, one of plaintiffs' mortgages was executed. *Held*, that the *lis pendens* in that action was no notice to M., as the complaint excluded the seminary parcel, and any agreement

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between third parties to include it therein and in the judgment was ineffectual to affect her rights under her mortgage, and, therefore, so far as she was concerned, there was a legal unincumbered title in H. at the time he executed the mortgages in question.

Also, *held*, that it was not necessary for the complaint to allege or for plaintiff to prove as part of her case that the mortgages were given for value; that while it might have been her duty to do this, after proof of the agreement by defendant, no objection having been taken on the trial because of failure to make this proof, the question could not be presented on appeal.

Pursuant to the judgment in the action for specific performance the seminary tract was sold to defendant B. By the judgment the referee appointed to sell was directed to pay all liens for taxes or assessments. Upon petition of the referee, and after hearing and upon request of B. and other purchasers, but without notice to the plaintiff in that action or to H. or M., an order was made directing the referee to pay out of the purchase moneys a sum which had been agreed upon between the purchasers and the town for taxes on the property included in the judgment, and also upon that conveyed by H. to W. and re-conveyed by him to H. By the order the purchasers, on proof of payment of the taxes, were allowed to retain the tax leases, certificates and assignments to them by the town, for the protection of their title. Upon the trial of this action B. claimed title and possession under the tax leases; that their validity could not be determined in this action, and that the same were paramount to the mortgages. *Held*, untenable; that while it was to be presumed that the seminary parcel was inserted in the judgment and sold with the consent of the parties to the action, the premises were in law sold subject to M.'s mortgages, and the duty of paying the taxes rested upon the mortgagor, which duty was discharged by the payment out of the proceeds of sale; and so, although by the order the purchasers were allowed to take assignments, this did not alter the character of the payment, and the taxes and tax titles were thereby extinguished.

*Reynolds v. Stockton* (140 U. S. 254), distinguished.

Subsequent to the re-conveyance to H. of the lots conveyed by him to W., H. conveyed them to another, and on the same day the grantee conveyed them to the wife of H., in whose name the title stood when the second mortgage to M. was executed; she died intestate, and through conveyances from her husband and heirs S. W. P. acquired title; he, after the payment of the taxes as above stated, conveyed the premises to his son, defendant C. W. P., "subject to all liens and incumbrances." S. W. P. purchased certain lots at the referee's sale and joined with B. in the request for the order as to payment of taxes. *Held*, that while, if S. W. P. had taken possession under his tax title, he might have set up such title and claimed it paramount to the mortgages, and while the validity of the claim could not have been litigated in the foreclosure

chase-money mortgage for \$150,000, dated September 24, 1870. This mortgage was duly recorded October 11, 1870. Mr. Clapp and Mr. Hawley were both interested in this scheme for cutting up the land into villa plots, and in order to improve the prospects of the sale of the balance it was determined to convey to the General Theological Seminary of the Protestant Episcopal Church in the United States, free and clear of all incumbrances, a tract containing 30 acres of the land above mentioned. Accordingly, and on or about the 10th of October, 1870, Mr. Clapp duly released the 30 acres intended for the seminary from the lien of his \$150,000 mortgage. This release was given to Mr. Thomas R. Hawley, and was absolute and full. On October 15, 1870, Mr. Hawley and wife conveyed this 30 acres thus released, to the above-named seminary. This deed stated that it was granted upon the condition that the land should be used and kept by them, the parties of the second part and their respective successors, for the purpose of a theological seminary, and the deed contained a covenant on the part of the seminary that it or its successors would, within five years from the date of the deed, erect buildings upon the premises for the purpose of a theological seminary, or that, in default of so doing, the seminary would, upon request, re-convey the premises to Thomas R. Hawley, one of the parties of the first part, his heirs or assigns, free, clear and discharged from any former or other gift, grant or conveyance thereof by the seminary, and from any lien or incumbrance suffered by them or either of them.

While the 30 acres or seminary tract was still owned by and in possession of the seminary, and on April 24, 1871, Thomas R. Hawley and Augusta W. Hawley, his wife, and Hawley D. Clapp, the mortgagee of the \$150,000 mortgage, made and executed what is termed the tripartite agreement, which was duly recorded, by which it was agreed that the land covered by the \$150,000 mortgage, together with other land owned by the Hawleys ("except that portion of the farm secondly above mentioned to which the General Theological Seminary of the Protestant Episcopal Church of the United States may *retain*

title”), should be sold by the Hawleys “with all proper and judicious dispatch,” in such lots and sizes as should be agreed upon, and of the purchase money arising from the sales of such lots Mr. Clapp was to have fourteen-twenty-fourths and the other parties ten-twenty-fourths. Provision was made for the taking of security for a portion of the purchase money not paid in cash, and other provisions, not here particularly material, were contained in the agreement.

Things remained in this condition until the 15th of June, 1871, when Thomas R. Hawley and wife conveyed to one R. M. Waters certain other portions of the land covered by this \$150,000 mortgage, including the so-called lots 70 and 71, and on that day Hawley D. Clapp released from the lien of his mortgage all of the premises thus conveyed by Hawley to Waters, with the exception of lots 70 and 71, which were not released and were conveyed to Waters subject to the lien of the Clapp mortgage.

On the 5th of May, 1873, the seminary having up to that time failed to build, conveyed the land back to Hawley, and that conveyance was recorded on the 23rd of September, 1875, and on the 9th of June, 1879, by deed recorded on that day, Mr. Waters reconveyed to Mr. Hawley all of the lots which Hawley had conveyed to him. Hawley was thus on June 9, 1879, seized of all the property which had been conveyed to the seminary and to Waters, and that property when the first of the two mortgages to plaintiff's testatrix was given stood in his name freed from the lien of the \$150,000 mortgage, except the two lots Nos. 70 and 71 above spoken of. In the meantime, and about October, 1874, Mr. Clapp began an action against Hawley and others to foreclose the \$150,000 mortgage, and in that complaint it was stated that the property deeded to the seminary and to Waters (except lots 70 and 71) had been released from the lien of the mortgage, and the complaint prayed for a foreclosure in regard to all the other land covered by the mortgage. Judgment was entered for the plaintiff in 1875, which provided for the sale of all the land described in that mortgage, excepting the premises which

had been released from the mortgage by Clapp and then conveyed to the seminary and to Waters. The judgment in that action was subsequently reversed by the General Term and a new trial ordered, and upon appeal to this court from the order granting the new trial the order was affirmed. The case is reported in memorandum in 69 N. Y. 625. It was reversed on the ground that the tripartite agreement above mentioned had taken the place of the \$150,000 mortgage and the mortgagee's rights were to be governed by that agreement.

On the 28th of July, 1880, Mr. Clapp having in the meantime died, his executors commenced an action against Thomas R. Hawley and others for the specific performance of the provisions of the tripartite agreement above mentioned and to obtain a sale of the property included in that agreement, including lots 70 and 71.

The complaint in that action described the property to be affected by it, including lots 70 and 71, but excluding from its description the 30-acre Seminary tract and the other land that had been once conveyed to Waters. Anne A. Morss, the plaintiffs' testatrix, was made one of the defendants in that action (the second mortgage to her not then having been given, and she appeared in it and answered the complaint and set up the releases of the land from the \$150,000 mortgage, and upon the trial of the action on the 12th of March, 1881, she put in evidence such releases, and the complaint was as to her dismissed by consent and her name thereafter omitted from the title and from the findings of fact and from the final judgment. The defendants Hawley having appeared in the same action and answered and gone to trial, the case was tried and judgment rendered, which judgment, instead of excluding the so-called 30-acre Seminary tract, directed that such tract should be sold with the rest of the property described in the complaint. The record thus showed a complaint to compel the Hawleys to sell certain land in which the Seminary tract was excluded, the dismissal of the complaint by consent as to Miss Morss, the appearance of the Hawleys in the action, their answer and their taking part in the trial,

and then a judgment following the trial in which the Seminary tract is directed to be sold with the rest of the land described in the complaint. The record does not affirmatively show an amendment of the complaint so as to include the Seminary tract within its prayer for judgment and sale, nor does the record show an affirmative and formal consent on the part of the Hawleys to the sale of such tract under the judgment. But there is no evidence in the record of any objection being taken by any of the parties to this inclusion of the Seminary tract, and all the parties interested in the question, with the exception of Miss Morss, were present at the trial and taking part therein. No exception is taken to the judgment, or to any subsequent proceedings thereunder, by the Hawleys or Clapp so far as the record shows. Pursuant to the judgment entered the referee appointed therein sold, on the fifth of August, 1889, the premises known as the Seminary tract to the defendant Burns, and the lots Nos. 70 and 71 to the defendant S. Webber Parker. The rest of the land which had been conveyed by Hawley to Waters, and back again by Waters to him, and which was covered by the mortgages to the plaintiffs' testatrix herein, was excluded from this judgment. The history of the title to that property is this: Subsequent to the re-conveyance of the lots by Waters to Mr. Hawley, and in May, 1880, he conveyed those premises to Charles B. Collins, who on that day conveyed the same to Angusta B. Hawley, the wife of Thomas R. Hawley, in whose name the title stood when the Hawleys executed the second mortgage to plaintiffs' testatrix in October, 1881. In August, 1888, Mrs. Hawley died intestate, seized of this property, leaving her surviving her husband and three sons. By deed from Thomas R. Hawley to his son R. W. Hawley, and by R. W. Hawley, in his own interest and as guardian for his brothers, and on the 27th of January, 1890, the property was conveyed to S. Webber Parker, one of the defendants herein. S. Webber Parker, on February 1, 1890, conveyed these lots to Charles Warren Parker, his son, one of the defendants

herein, "subject to all liens and incumbrances now existing on the several pieces of property, or any of them." It will be remembered that lots 70 and 71 had been sold under the judgment in the specific performance action and had been purchased by S. Webber Parker, who, on January 6, 1890, conveyed them also to Charles Warren Parker.

Coming back to the judgment in the specific performance action, an inspection thereof shows that it directed the sale of the property mentioned in the complaint, and also the Seminary tract of thirty acres, and from the proceeds of such sale the referee appointed in the judgment was directed to pay any lien or liens upon said premises so sold at the time of such sale for taxes or assessments. The sale of the lands, including the Seminary tract, took place under the judgment of foreclosure and sale on the 5th of August, 1889, and on September 5, 1889, the referee's deed to Edward Burns for the Seminary tract was delivered, and also the deed to S. W. Parker for the lots he purchased, numbers 70 and 71. On November 26, 1889, upon the petition of the referee, and upon his motion, and after hearing counsel for the purchasers, Parker and Burns, and at their request, but so far as appears without any notice to the plaintiff or the defendant Hawley in that action, or to Miss Morss, the court made an order permitting the referee to pay the sum of about \$8,000 to the purchasers as an amount agreed upon between the purchasers and the town of Mamaroneck, to be paid in full for taxes upon the property included in the judgment, and upon the Waters property, and this payment was to be made out of the purchase price of the sale of the property by the referee, and upon proof by the purchasers that they had paid those taxes, and by a provision in the order the purchasers were allowed to retain the tax leases, certificates and assignments to them from the town for the protection of their title. It appears from the report of the referee, which was filed April 25, 1890, that the provisions of the above order were carried out, and that the referee had paid to S. Webber Parker for taxes the sum mentioned in the order as



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the amount agreed to be paid to the town of Mamaroneck for full settlement of its claim for such taxes, and had taken Parker's receipts therefor, and that Parker had taken the assignment of tax leases from the town. These leases cover the lands included in both mortgages of the plaintiffs' testatrix herein, and Parker assigned to Burns those leases which cover the Seminary tract and retained for himself those which cover the other property. At the commencement of this action Burns was in possession of the Seminary property and Charles Warren Parker, under his deed from his father, was in possession of the other property covered by the mortgages of plaintiffs' testatrix. They both claimed to be in possession under these tax titles. It is not found that this was their only claim. It will be seen that Miss Morss was a stranger to all these proceedings subsequent to the time (May 7, 1881) when the complaint in the specific performance action was dismissed as to her. A formal order was subsequently, on Sept. 28, 1889, entered to that effect *nunc pro tunc* as of the time it was actually made.

Upon the trial of this action these defendants, Burns and Chas. W. Parker, claimed title under the tax leases, and alleged that they were paramount to the mortgages, and they insisted that their validity could not be determined in this action. The court found that they were in possession of the respective properties at the time of the commencement of this action, and claimed to be the owners thereof under their tax titles, and that when they procured the assignment to them from the town of Mamaroneck of the tax leases they did not intend to merge such title in any other title which they might have. The court did not find that the defendants claimed possession under no other title. It made decree for the sale of the premises under the mortgage of the plaintiffs' testatrix, cutting off all title which the defendants set up under those tax leases, and providing for the conveyance of a title by the referee which should be paramount to any title derived from such tax leases, excepting as to lots 70 and 71, which were directed to be sold subject to the lien and rights under the

\$150,000 mortgage or its substitute, the tripartite agreement above stated.

*Michael H. Cardozo* for appellant Burns. The title of the defendant Burns to the seminary tract is prior and paramount to the title of the plaintiffs. (Cooley on Taxn. 500, 506; Hilliard on Taxn. 530; *Blake v. Howe*, 15 Am. Dec. 684; *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Freeman v. Alderson*, 119 U. S. 187; *Pennoyer v. Neff*, 95 id. 714; Brown on Jurisdiction, 169, 199; *Corwith v. Griffing*, 21 Barb. 9; *Reynolds v. Stockton*, 140 U. S. 254; 27 Abb. [N. C.] 132; *Munday v. Vail*, 34 N. J. L. 418; *Windsor v. McVeigh*, 93 U. S. 274; *Hovey v. Elliott*, 145 N. Y. 126; *Laverty v. Moore*, 33 id. 658; 1 Black on Tax Tit. § 570; *Wright v. Sperry*, 21 Wis. 336; *Blackwood v. Van Vliet*, 30 Mich. 118; *Sturdevant v. Mather*, 20 Wis. 606; *Gardiner v. Gerrish*, 23 Maine, 46; *Link v. Doerfer*, 42 Wis. 395; *Seaver v. Cobb*, 98 Ill. 203; *Bybee v. O., etc., R. R. Co.*, 139 U. S. 633; *Chard v. Holt*, 136 N. Y. 30, 44; *Arthurs v. King*, 95 Penn. St. 172; *Moss v. Shear*, 25 Cal. 38; *Bowman v. Cockrill*, 6 Kans. 311; *Moulton v. Cornish*, 138 N. Y. 133, 145; *Brainard v. Cooper*, 10 id. 356; *Francklyn v. Hayward*, 61 How. Pr. 43; *Smith v. Roberts*, 91 N. Y. 470; *Edgerton v. Young*, 43 Ill. 464; 2 Wash. on Real Prop. 193; *McLaughlin v. Green*, 48 Miss. 175, 209; *Brown v. Simons*, 44 N. H. 475; *Moore v. Titman*, 44 Ill. 370; *Williams v. Townsend*, 31 N. Y. 411; *Ten Eyck v. Craig*, 62 id. 406; *Watterson v. Devoe*, 18 Kans. 223; *Morrison v. Bank*, 81 Ind. 335; *Morrow v. Dows*, 28 N. J. Eq. 459; *Cameron v. Irwin*, 5 Hill, 280; *Nellis v. Lathrop*, 22 Wend. 121; *In re Wilbur v. Warren*, 104 N. Y. 192; *Weichselbaum v. Curlett*, 20 Kans. 709; *Lanier v. Smith*, 37 Hun, 529; *C. M. L. Ins. Co. v. Bulte*, 45 Mich. 113; *Cromwell v. MacLean*, 123 N. Y. 474; *Nelson v. Brown*, 144 id. 384; *M. Bank v. Thompson*, 55 id. 7.) Even if the appellants are disabled from acquiring a tax title to the premises which were sold pursuant to the judgment in *Clapp v. Hawley*, and are

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simply and solely in the position of prior mortgagees, the second of the two mortgages held by the plaintiffs is in no event a lien upon the property, and the judgment, in so far as it permitted the enforcement of that mortgage, is incapable of support. (*Ayrault v. Murphy*, 54 N. Y. 203.) The title of the defendant Parker to lots 54, 56, 57, 58, 59, 60, 116, 119 and 120 is prior and paramount to the title of the plaintiffs, and the sale should have been decreed to be subject to his prior rights and interests therein. (*McConihe v. Fales*, 107 N. Y. 404; *Freeman v. Auld*, 44 id. 50; *Chard v. Holt*, 136 id. 30.) Whatever may be the true view as to the rights of the appellants under the tax titles which they have acquired, and whatever the true construction of the tripartite agreement, there can be no doubt that, under the findings of the trial court by which the respondents are concluded, the dismissal of the complaint was logically required; and the judgment foreclosing and barring the interest of the appellants must, therefore, be reversed. (*Place v. Hayward*, 117 N. Y. 487; *Wangler v. Swift*, 90 id. 38; *Rogers v. Murray*, 3 Bosw. 357; *Bunter v. O., etc., Ins. Co.*, 4 id. 254; *Emerson v. County of Santa Clara*, 40 Cal. 543; *Fleming v. Ins. Co.*, 4 Whart. 59; *Schwinger v. Raymond*, 83 N. Y. 192; *Bennett v. Bates*, 94 id. 354, 367; *Wahl v. Barnum*, 116 id. 87, 89.)

*Wilson Brown, Jr.*, for appellant Parker. It was error to admit evidence attacking defendants' tax leases for any purpose. (*Cromwell v. MacLean*, 123 N. Y. 474; *Mills v. Odell*, 21 Wkly. Dig. 61.) It was irregular and improper to allow records prior to the mortgages of plaintiff, and they could only have been offered by plaintiff to confuse the court in anticipation of the defense, or else to attempt to try the validity of defendants' tax titles pleaded by them, and no tax titles can be tried in this foreclosure action against the objection of defendants, and unless by their consent. (*Cromwell v. MacLean*, 123 N. Y. 474.) The conclusion of the court that the plaintiff is entitled to a judgment of foreclosure and

sale against the appellants cannot be sustained. (*Champney v. Cooke*, 32 id. 543.)

*C. N. Bovee, Jr.*, for respondent. As to all of the property covered by her mortgages, except lots 70 and 71, Anne A. Morss was a *bona fide* mortgagee, without notice of the tripartite agreement between Hawley and wife and Clapp, or of the judgment directing a sale of the seminary tract in the suit of Clapp's executors against Hawley, and is entitled to the protection of the Recording Act. (2 R. S. chap. 3, § 38; *Baker v. Thomas*, 61 Hun, 17; *Bacon v. Schoonhoven*, 87 N. Y. 446; *Frear v. Sweet*, 118 id. 454.) Burns, as the owner of the equity of redemption of Thomas R. Hawley and Augusta W. Hawley in the thirty acres seminary tract, could not acquire and hold tax titles as against a prior mortgagee from the owner whose equity of redemption he had acquired. Such purchase operated as a payment of the tax and an extinguishment of the tax title. (Thomas on Mort. § 29; *Christy v. Fisher*, 58 Cal. 256; *M. S. Bank v. Bacharach*, 46 Conn. 513; *Cooper v. Jackson*, 99 Ind. 566; *Ins. Co. v. Patten*, 98 id. 209; *Fair v. Brown*, 40 Iowa, 209; *Anson v. Anson*, 20 id. 55; *Horton v. Saunders*, 13 Mich. 409; *Fells v. Barbour*, 58 id. 49; *Woodbury v. Swan*, 59 N. H. 22; Jones on Mort. § 680; *Gould v. Day*, 94 U. S. 405; *Chard v. Holt*, 136 N. Y. 30, 44; Cooley on Taxn. 345; Wiltse on Foreclosure, § 505; *De Forest v. Farley*, 62 N. Y. 628; *Blakeley v. Calder*, 15 id. 617; *Graham v. Bleakie*, 2 Daly, 55; *Ogden v. Walters*, 12 Kans. 282; *Woodhull v. Little*, 102 N. Y. 165.) Burns and Parker are estopped from setting up the tax titles acquired by them from the town of Mamaroneck under the order of the court dated November 26, 1889. (*Chard v. Holt*, 136 N. Y. 30; Cooley on Taxn. §§ 23, 345, 346; *Blake v. How*, 15 Am. Dec. 681, and note, 684, and cases in notes; Hilliard on Taxn. 530; Thomas on Mort. § 29; *Moss v. Shear*, 25 Cal. 45; *Christie v. Fisher*, 58 id. 256; *Fair v. Brown*, 40 Iowa, 209; *Horton v. Saunders*, 13 Mich. 409; *Anson v. Anson*, 20 Iowa, 55.) Charles W. Parker, as the owner of lots 54,

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56, 57, 58, 59, 60, 116, 119 and 120, by conveyances from S. W. Parker, "subject to all liens or incumbrances now existing on the several parcels or any or either of them," is estopped from questioning the validity of plaintiff's mortgages. (*McConihe v. Fales*, 107 N. Y. 404.) It was competent for plaintiff to give in evidence the chain of title to the property from the date of the \$150,000 Clapp mortgage down to the time of the commencement of the actions under the issues raised by defendants' answer. (*Brown v. Volkening*, 64 N. Y. 76; *Wiltse on Foreclosures*, § 193; *Horton v. Saunders*, 13 Mich. 409; *Helck v. Reinheimer*, 105 N. Y. 470.) A dismissal of the complaint was not required by the conflicting findings. They are all reconcilable, and can be found to harmonize with the other findings and the judgment. (*Green v. Roworth*, 113 N. Y. 462-467; *T. N. Bank v. Parker*, 130 id. 415, 417; *Cohoes v. C. Co.*, 134 id. 397-405.)

PECKHAM, J. Upon this somewhat complicated state of facts the defendants Charles W. Parker and Edward Burns, upon their appeal here, have argued several objections which they have urged as fatal to the plaintiffs' judgment herein.

First. It is claimed that the plaintiffs' testatrix took her mortgages subject to the provisions of the tripartite agreement as a substitute for the \$150,000 mortgage above mentioned, and that under that agreement the lands covered by the mortgages were to be sold by Mr. Hawley, and fourteen-twenty-fourths of the proceeds of the sale were to go to Mr. Clapp and the balance to Mr. Hawley. The defendants urge that although the Seminary tract when conveyed to the Seminary was released from the lien of the \$150,000 mortgage, yet by reason of the covenant in the deed to the Seminary the clause in the tripartite agreement which provides for the sale of all the property "except that portion of the farm secondly above mentioned to which the General Theological Protestant Episcopal Church of the United States may retain title," such Seminary tract upon being re-conveyed to Mr. Hawley became subject to the tripartite agreement, and became a portion

of the land which under the provisions of such agreement was subject to be sold, and the proceeds divided as stated. The plaintiffs' testatrix had in fact no notice of this tripartite agreement, but the defendants claim that the record thereof was constructive notice to all subsequent purchasers or mortgagees, and that the plaintiffs' testatrix was, therefore, bound to know of its existence and its contents, and that when she took her mortgages she took them subject to all rights of third parties provided for in that agreement. It will be recollected that this tripartite agreement was made between the Hawleys and Mr. Clapp after the Hawleys had conveyed this Seminary tract to the Seminary, and before the Seminary re-conveyed it to Mr. Hawley. Tracing the title, therefore, of this tract from Mr. Clapp to Mr. Hawley, and from Mr. Hawley to the Seminary, and back from the Seminary to him, without searching against Mr. Hawley during the time when he had no title to the Seminary tract, this tripartite agreement would not appear. But it is urged on the part of the defendants that the title having once come into Mr. Hawley, it was the duty of any one searching the title to continue the search against Mr. Hawley after he had parted with the title and up to the time it again was vested in him, and that this duty was strengthened by reason of the condition and covenant contained in the deed from Hawley to the Seminary.

If this alleged duty had been discharged then it is said this agreement might have been discovered. I do not think that the record of the agreement was constructive notice to the plaintiffs' testatrix of the existence of such agreement. The form of the deed to the Seminary left no title in Hawley. If during the time in which the title to the Seminary tract was in the Seminary, Mr. Hawley had conveyed that tract, not having the title in him, and had given a deed with warranty of title, the subsequent acquisition of the title by Mr. Hawley would inure at once to the benefit of his grantees with warranty, by virtue of such warranty and the estoppel which would arise therefrom. Mr. Hawley in such case would be estopped from setting up as against his grantee the fact that he was not

vested with any title to the property which he conveyed with warranty at the time of such conveyance, and the privies of Mr. Hawley in law, in blood or in estate, would be equally bound by that estoppel. The title would pass to his grantees with warranty the very instant it was acquired by Hawley. Thus the record of the deed with warranty and the title of his grantees in such deed would both precede the record of the mortgages to the plaintiffs' testatrix, and she would, in that case, have been bound by the estoppel, and the record would have been notice to her of the existence of the deed. Such is the case decided in the Commission of Appeals in *Tefft v. Munson* (57 N. Y. 97), cited by the learned counsel for the appellants. In that very case the learned judge who delivered the opinion of the court assumed it to be the rule that the record of a conveyance, made by one having no title, would ordinarily be a nullity, and constructive notice to no one. But it was held that the plaintiff in that case could not avail himself of this rule on account of the operation of the estoppel in the prior mortgage. The case of *White v. Patten* (24 Pick. 324) was therein cited as analogous to the case then at bar. A reference to the case in *Pickering* shows the same principle of an operation by estoppel on account of warranty.

But in this case there was no conveyance, there was no warranty and there was no estoppel. It was not the mortgaging of after-acquired property. When the agreement was made by which Hawley bound himself to proceed and take measures to sell certain lands owned by him at auction and to divide the proceeds in a certain way, the title to the Seminary tract was not in him. He simply agreed that as to such land it should be included in the agreement, if the land came back to him. That is, he agreed in that event to sell to some one else at auction and divide the proceeds with Mr. Clapp. That was no such conveyance as operates by estoppel when the title is subsequently acquired and it is no such instrument that the recording of it when Hawley had no title to the Seminary tract, operates as constructive notice to a subsequent mortgagee after Hawley had title and who has his mortgage

recorded. It might perhaps be doubted whether the language of the agreement in regard to its application to the Seminary land placed that land necessarily within the agreement, but it may here be assumed as the court found that it did. There is no claim that the plaintiffs' testatrix had notice in fact of the circumstances of this agreement and consequently when she took her first mortgage she was not affected by the existence or provisions of that agreement.

The defendants urge, however, that in regard to the second mortgage to the plaintiffs' testatrix in October, 1881, after the trial in the action to enforce specific performance of the tripartite agreement, she took such mortgage with notice of the existence of the agreement by reason of the *lis pendens* in that action and by virtue of such judgment. She was no party to that action. The judgment therein was not entered until February 4, 1882, and sometime subsequent to the execution of the second mortgage. One of defendants' objections offered to receiving the judgment in evidence was that it was not admissible as made after the delivery of the mortgages to plaintiff. The complaint therein had been dismissed upon the trial as to her and from that time her name had been omitted from the title of the cause, from the findings of the court and subsequently from the judgment entered thereon. She was, therefore, a stranger to the action and it could not operate to charge her with any notice of the existence of the agreement. The *lis pendens* was no notice because the complaint in the action excluded the Seminary tract and any agreement between third parties to include it therein and to insert it in the judgment was ineffectual to in any way affect her rights under her mortgages. There was nothing in the complaint to charge her with notice of the tripartite agreement as to this property. While proper enough as between the parties to the action who appeared upon the trial and consented thereto, the agreement to include the Seminary tract in the decree of sale had no effect upon the rights of the plaintiffs' testatrix.

Second. It is urged, however, that this agreement and the



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provisions in regard to it are superior to all subsequent grantees or mortgagees, excepting those who occupy the position of grantees or mortgagees for value, and there is no proof in this case that the plaintiffs' testatrix occupied such a position. It is said that this is not alleged in the complaint, and that there is no proof in the case to that effect. It was not necessary to allege it in the complaint, although I think it is substantially set forth. The record of the tripartite agreement was not constructive notice, and, so far as she was concerned, there was a legal title on the record and unincumbered in Mr. Hawley at the time he executed the mortgages in question. He was not only clothed with the record title, but he was in possession thereof under that title, and as to plaintiffs' testatrix there was no prior record of any conveyance which was constructive notice to her. There was, therefore, no reason for alleging in the complaint what the plaintiff was not presumed to know, that is, the existence of the tripartite agreement, and, therefore, it was not necessary for her to state the facts which would prove her a purchaser for value, or to allege that she was such purchaser. There was nothing on her side of the case to present the question of value. If the agreement had been necessarily a part of the plaintiffs' case, and it became necessary for her to avoid the effect of its priority of execution, it might have come within the rule which requires a subsequent grantee or mortgagee in certain cases to allege in his pleading and to show that he occupied the position of a purchaser for value. After the defendants proved the tripartite agreement, it may then have been the duty of plaintiff, when she had the case again, to show that she was a mortgagee for value, and if the objection had been taken on the trial the plaintiff might then have shown more fully the facts regarding the execution of the mortgages. The finding of the court upon the trial, if based upon any evidence, that there was due from defendant Hawley upon the bonds accompanying the mortgages the amount of some \$10,000, no part of which had been paid, showed that the plaintiffs' testatrix did occupy the position of a mortgagee for

value. The proof of the due execution of the bonds under seal upon the trial imported a consideration, and no point of a failure of consideration or that plaintiffs' testatrix had not advanced a valuable consideration was taken upon the trial. No motion to dismiss the complaint or for other relief on that ground was made, and, so far as the record shows, there was an entire absence of any action of defendants' counsel based upon a lack of evidence of this kind. It is too late to urge a ground for reversal here which was never brought to the attention of the trial court, and which, if it had been, might have been at once obviated. There was proof upon the trial that the principal and interest of the two mortgages were due and unpaid. The evidence was sufficient to sustain the finding that such an amount was due, and to show, in the absence of all objection or evidence to the contrary, that plaintiffs' testatrix was a purchaser for value.

Third. The defendants Burns and Charles Warren Parker, however, claim that they are in possession of their respective pieces of property under tax titles, which are paramount to these mortgages and to the title of the mortgagors, and that the regularity or validity of such title cannot in any event and against their objections be tried in this action. They also claim that they are in a position to set up as against all the world such tax titles and all rights flowing therefrom. The defendant Burns says that he is in a position to set up such tax title as to the Seminary tract, because as matter of law he never took any title whatever to that tract by virtue of the referee's deed to him purporting to convey such tract by virtue of a judgment in the action to enforce the provisions of the tripartite agreement. He says that he never took any such title because the complaint in that action excluded from its operation the Seminary property, and that there is no amended complaint in the record bringing such property within its description of the land to be sold and that under such circumstances its inclusion in the judgment and an assumed sale of the property thereunder was wholly without jurisdiction, the sale was entirely void and no title whatever

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to the Seminary tract passed by virtue of the deed of the referee. Mr. Burns evidently did not believe this to be the case when he purchased the property at the referee's sale under the judgment in August, 1889, and when he took the referee's deed a month thereafter conveying the Seminary property to him. He certainly did not buy for amusement or take the referee's deed for any such purpose. He had a month in which to examine the title to the lands which he purchased before taking a deed, and it is clear that when he did take one he supposed that he was purchasing something of value. That he supposed at that time that he was getting title to this Seminary property, and consequently that the proceedings leading up to the judgment in the action were regular and valid is also to be inferred from the fact that upon the trial of this action he asked the court to find as a fact, and the court did find, that an action for the specific performance of this agreement and to enforce the sale of the property therein mentioned, *including this Seminary tract*, was commenced July 28, 1880, and on the 14th of May, 1881, judgment was entered in that action directing the sale of property covered by that agreement, including the said Seminary tract of 30 acres. The claim that he took no title is evidently an afterthought to Mr. Burns. It appears, however, that the plaintiffs in that action and the defendants Hawley were not only parties, but that defendants Hawley answered, were present on the trial through counsel and took part in it, and no objection appears to have been made to the including of the Seminary tract in the judgment and to the direction for the sale of such tract with the other lands described in the complaint. It would seem to have been a very proper agreement to make between these parties and thus to include a sale of all the property mentioned in the tripartite agreement, including the Seminary tract. No one else had any interest in the matter excepting Miss Morss, the plaintiffs' testatrix, and as to her it would not, of course, be binding. The sale would necessarily, therefore, be subject to her interests, but with that exception every one who had any interest in the property to be sold was before

the court, and, as has been stated, no objection or exception to such proceedings appears to have been taken. It is inconceivable that the Seminary tract was thus included without the consent of these parties interested in this land, who were present upon and taking part in the trial and equally interested in the contents of the judgment. In such event, it is not only proper, but it is the duty of the court to presume that it was done with the consent of these parties, and that a proper amendment to the complaint was actually made, although no formal amendment appears on the record.

This is altogether a different case from that of *Reynolds v. Stockton* (140 U. S. 254, 265), cited by the learned counsel for the defendant. In that case a defendant appeared in an action in a state court and responded to the complaint as filed, but he took no subsequent part in the litigation, was not present at the trial, and no consent to the proceedings on the trial could be presumed from the record in the case. The learned judge, delivering the opinion in that case, expressly said that they were not concerned therein as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. He further said "there was no appearance after the filing of the answer, and no participation in the trial or other proceedings, and whatever may be the rule where substantial amendments to the complaint are permitted and made and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that where he appears and responds only to the complaint filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which, by the pleadings, are put in issue." The learned judge also said: "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not in effect put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed that that

is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made."

The very matter lacking in the case cited is present here. The defendants Hawley were present at the trial, took part in the proceedings, and it must be presumed consented to an amendment and to the inclusion of the lands in the judgment directing their sale. We do not question the correctness of the rule laid down in the case cited from the Federal Supreme Court, and it is consistent with that which has obtained in the courts in this state and been frequently so decided.

The facts in this case are so plain, and the inference of consent so incontestable, that we should be doing violence to every reasonable presumption if we were to hold that this land was included in the judgment against the objection and without the consent of the parties to be affected thereby. No court ought to run counter to so strong a presumption of fact. We must presume, therefore, what we have no doubt is in accordance with the facts of the case, that the complaint was treated and regarded as, though not perhaps formally, amended, and the land was inserted in the judgment with the consent of the parties to the action. Mr. Burns, therefore, upon the purchase of the Seminary lot under that judgment, obtained a title thereto the same as if the land had been at first and formally described in the complaint, and in accordance therewith had been included in the judgment.

On September 5, 1889, after he had received the deed of the referee, pursuant to that judgment, and being vested with the title to the Seminary land by virtue of such deed, we think it clear that he was not in a position to obtain a tax title to the same property under the circumstances detailed in the foregoing statement of facts. A perusal of the order of the court made in November, 1889, under which these tax titles were obtained, shows conclusively that they were obtained with moneys arising from the sale of lands under the decree and judgment of the court in the action to enforce specific performance of the

tripartite agreement. It was the duty of the mortgagor to pay the taxes and keep the property which he had mortgaged free from any lien of that nature. This duty he was discharging when, by virtue of the judgment, he was, through the referee as his agent, paying such taxes with the moneys arising out of the sale of the lands. As the lands were in law sold subject to the plaintiffs' mortgages, the payment of the taxes cleared off incumbrances which might otherwise become and remain paramount to the mortgagor and the mortgages which he had given. The judgment in recognition of this duty of the mortgagor directed the referee, out of the moneys arising from the sale of the lands therein described, to pay "any lien or liens upon said premises so sold at the time of such sale for taxes or assessments." The order for the payment of these taxes was made upon the petition of the referee and the tax return of the supervisor of the town of Mamaroneck, showing over \$12,000 of taxes due the town, and after hearing counsel for the motion and for the town, and also counsel for the purchasers at the sale by the referee, and the result of such order was a payment of the taxes at an amount agreed upon between the purchasers and the town less than the amount actually due, and such payment was made out of the proceeds of the sale of the land. It is true the purchasers were permitted by that order to take assignments of the leases and certificates for the purpose, as alleged, of the protection of the title of such purchasers. When consummated the taxes were, nevertheless, paid out of these proceeds of sale, and although the purchasers under this order of the court were allowed to take assignments instead of formally paying the amount of taxes agreed upon, yet such action did not alter the essential nature of the payment, and the taxes and titles were thereby extinguished. The payment by Parker, instead of by the referee, was, so far as the record shows, without the knowledge or consent of the parties to this tripartite agreement, without their appearance in court, without service of any notice of the motion upon them and in violation of the rights of the holder of these mortgages if the

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contention of the defendants should now prevail. The plaintiffs' testatrix had the right to insist that the directions of the judgment providing for the payment of the taxes by the referee out of the proceeds of the sale of the lands should be complied with, and that upon such payment the taxes should be extinguished and not kept alive as an earlier incumbrance on the property over her mortgages. She was a prior incumbrancer on the Seminary lands to every one excepting as to liens for taxes, and Mr. Burns could not in violation of the judgment so use the moneys of the mortgagor arising from a sale of those lands as to acquire and set up a title paramount to the mortgages in question. This is not trying the validity of these tax titles, but we hold that by virtue of the purchase of the Seminary tract by Burns under this decree he became incapacitated from thereafter availing himself of the funds which arose out of such sale, and he could not, contrary to the direction to the referee contained in the judgment, pay those taxes himself out of such moneys and hold the tax titles and set them up against these mortgages in question as a paramount title to the lands covered by such mortgages. This applies to the position occupied by Mr. Burns in relation to the Seminary tract. In this light the cases of *Williams v. Townsend* (31 N. Y. 411) and *Ten Eyck v. Craig* (62 id. 406) are wholly inapplicable.

Fourth. As to the lands which are included in the conveyance by Hawley to Waters and by Waters subsequently reconveyed to Hawley, and then included in the mortgages by Hawley to the plaintiffs' testatrix, the defendant Chas. W. Parker occupies a different position. These lands, excepting lots 70 and 71, which will be spoken of hereafter, were not included in the judgment for sale in the tripartite agreement action, and when the defendant S. Webber Parker bought them or the leases at the tax sale he had no other title to the lands and was not in any position which would preclude him from their purchase, and if made with his own money he would have taken such title as the leases gave him unaffected by any

of the circumstances above described. If S. Webber Parker had taken possession of this Waters land under his tax title, he might have set up such title and claimed it to be paramount to the title of the mortgagor Hawley and to override the title under the mortgage, and such claim by title paramount it would not have been proper in this foreclosure action to litigate under an objection to a trial as to its validity. (See *Cromwell v. MacLean*, 123 N. Y. 475.) Although the title was not really a valid one, because the taxes were in fact paid as already stated, yet the foreclosure action was not the proper one in which to test that validity. The rule as to the impropriety of trying the question as to the validity of a paramount title in such an action as this against the objection of a defendant has been reiterated in this court as lately as in the cases of *Jacobie v. Mickle* (144 N. Y. 237) and *Nelson v. Brown* (Id. 384). (See, also, *Lewis v. Smith*, 9 id. 502.)

Mr. S. Webber Parker did not, however, retain his title to these lands. He conveyed the same to his son, Charles Warren Parker, one of the appellants in this action, and such conveyance was made in terms "subject to all liens and incumbrances now existing on the several pieces of property or any of them," and at the time of the commencement of this action the same Charles Warren Parker was in possession of these premises conveyed to him by his father, subject, as stated, to existing incumbrances. The counsel for appellants admits that if plaintiffs' mortgages were in fact at that date subsisting liens, then it might be that the clause in question would estop the appellants from disputing their validity. He insists, however, that they were not existing liens because the tax leases had cut them off. If the taxes had been paid then the mortgages had not been cut off. The title of Mr. Parker was in that event not paramount. Upon these facts, and by reason of that clause in the deed, it was proper to show the whole truth regarding the existence of the tax title, and if, upon the facts shown, such tax title did not exist and had on the contrary become extinguished, then the mortgages were existing liens and Parker's title was subject to them. An inquiry as



to this question was rendered proper by reason of the clause in the deed to Parker from his father. The issue was whether the mortgages in suit were still liens, and they were if the taxes had been paid.

In this way we are brought back to the question as to the effect of the transactions resulting in the payment of the moneys to the town of Mamaroneck and the assumed assignment of the leases and certificates by that town to Mr. C. W. Parker. We have seen that the effect of the transaction was the payment of those taxes with the moneys arising from the sale of the lands sold under the judgment in the action to enforce the specific performance of the tripartite agreement. Those moneys, in fact, paid the taxes on the Waters lands, although these lands were not included in the judgment, just as much as they paid them on the Seminary lands, and Mr. Parker had no more right to claim a payment by him of the taxes on the Waters lands than Mr. Burns had on the Seminary lands, for they were both paid with moneys of the mortgagor which did not belong to either of them.

It is argued, however, that there is no proof that the order which provided for the payment of the taxes as already mentioned was carried out and that all that appears is the order itself. The purchasers Burns and Parker made themselves parties to this order by appearing by counsel and substantially asking that it be made. Although made upon the petition of the referee, the whole order shows that it was a proceeding in their interest, for their accommodation and instituted by them. Subsequent to its entry the referee made his report of the sale under the judgment, and of his proceedings under that order, in which it was stated that he had paid the money provided for in the order, to Mr. Parker, one of the purchasers, and had taken his receipt for the same, and also a release of the referee of all responsibility and claims against such referee individually or otherwise by reason of the taxes or tax leases against the property, or in any order of record affecting the premises sold by such referee. The referee in his report also produced the voucher provided for in the

order as evidence of the payment of the tax to the town by Parker. No exception or objection to that report was ever made or taken by either of these defendants, purchasers, and its statements were not contradicted on this trial, and it remains of record in the action. The defendants object that this referee's report is no evidence whatever against them of the payment of the moneys spoken of in the order and report and that there is no other evidence in the case showing such payment. The case of *Mills v. Odell* (21 Weekl. Dig. 61) is cited in favor of the view that this report of the referee is not competent evidence of the facts therein stated against these purchasers. The case does not bear out the contention of the counsel. It was there held that the report of the referee in partition was not evidence against a county treasurer who had no connection with the action in any form other than to receive the money or a mortgage directed by the decree to be given to him. He was a stranger to the whole proceeding, knew nothing whatever about it and ought not to be bound by the statements contained in the referee's report of his proceedings in such an action. The case here is different. These parties were purchasers at the sale; they made themselves particularly parties to the proceedings which resulted in the payment of these taxes, and we think that the report of the referee in such case is some evidence, not conclusive, but enough in the absence of all contradiction to show the payment of moneys even as against Mr. Burns and Mr. Parker.

Fifth. The lots 70 and 71 (part of the lands conveyed to Waters) were included in the sale under the judgment in the tripartite agreement action and were purchased by Mr. S. Webber Parker. They were never released from the lien of the \$150,000 mortgage and were included in the tripartite agreement, and in that respect they differ from the other lands, but in regard to these lots, Mr. Parker having purchased them at the referee's sale, occupies the same position in regard to them as the defendant Burns does in regard to the Seminary tract, and he was, therefore, incompetent to make use of the money of the mortgagor for the purpose of pur-

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chasing the tax title and of setting it up as a title paramount to the mortgage of the mortgagees in this action. As they were, however, never released from the lien of this \$150,000 mortgage, these lots could not be sold excepting subject to that lien or its substitute, the tripartite agreement, and they were directed to be so sold in the judgment in this action. We see no error in that.

Sixth. It is claimed that there is some inconsistency among the conclusions of law found by the learned court below, and that some are inconsistent with the one which provides for the foreclosure and sale of the lands described in these two mortgages. We think, taking the whole facts and conclusions of law together, there is nothing to prevent the enforcement of the judgment of the Special Term, and that such judgment as affirmed by the General Term of the Supreme Court must be here and in all things affirmed, with costs.

All concur.

Judgment affirmed.

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HEWLETT SCUDDER et al., as Executors, etc., Appellants, v.  
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY  
OF NEW YORK, Respondent.

The provision of the New York Consolidation Act (§ 879, chap. 410, Laws of 1882) declaring that no action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city or to remove a cloud on title, but that the property owners shall be confined to the remedies given, is not limited to actions wherein it is sought simply to vacate assessments or to remove clouds on title, but prohibits as well an action to restrain the creation of a cloud on title by means of a sale by virtue of an assessment and the giving of a lease consequent on such sale on the ground that the assessment is void. The relief sought in such a case is, in substance, a vacation of the assessment.

The section was intended to confine property owners in all cases of alleged void assessments to the remedies provided for in the act.

*Lennon v. The Mayor* (55 N. Y. 361), distinguished.

(Argued May 3, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 15, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*James A. Deering* for appellants. The assessment, although illegal in fact, was not illegal and void upon the face of the record thereof. (*Tripler v. Mayor, etc.*, 125 N. Y. 617; *People ex rel. v. Assessors*, 99 id. 683; Laws of 1871, chap. 574, § 6; Laws of 1861, chap. 308; *In re Bassford*, 50 N. Y. 509.) The plaintiffs are entitled to maintain this action and to an injunction restraining the sale of their property. (*King v. Townshend*, 141 N. Y. 358; *Lennon v. Mayor, etc.*, 55 id. 361; *Crooke v. Andrews*, 40 id. 550; *Hatch v. City of Buffalo*, 38 id. 276; *Scott v. Onderdonk*, 14 id. 9; *Allen v. City of Buffalo*, 39 id. 386; *Pettit v. Shepherd*, 5 Paige, 493; *Oakley v. Trustees*, 6 id. 262; *Mann v. City of Utica*, 44 How. Pr. 334; *Sanders v. City of Yonkers*, 63 N. Y. 489; Laws of 1874, chap. 312, § 2; *People v. Myers*, 135 N. Y. 465; *Chase v. Chase*, 95 id. 373; *In re Smith*, 99 id. 424; *Tripler v. Mayor, etc.*, 125 id. 617; *M. L. Ins. Co. v. Mayor, etc.*, 144 id. 494.)

*D. J. Dean* for respondents. An action of this nature is forbidden by section 879 of the Consolidation Act. (Laws of 1882, chap. 410, §§ 879-914; Laws of 1858, chap. 338; Laws of 1880, chap. 550; *Lennon v. Mayor, etc.*, 55 N. Y. 361; *Astor v. Mayor, etc.*, 62 id. 580; *People ex rel. v. Myers*, 65 Hun, 14; 135 N. Y. 468; *S. A. R. R. Co. v. Mayor, etc.*, 63 Hun, 271; *Mayer v. Mayor, etc.*, 101 N. Y. 284; *In re Smith*, 99 id. 424-427; *Chase v. Chase*, 95 id. 373; *In re Brainerd*, 51 Hun, 380, 384, 385.) The plaintiff shows no ground for equitable relief. If the plaintiff's position, that the assessment is utterly void, under the decision of the Court of

Appeals, from lack of jurisdiction, is correct, the so-called assessment is a mere nullity and is not a cloud upon the plaintiff's property, and does not present a case for an injunction. (Dillon on Mun. Corp. § 906; *Van Doren v. Mayor, etc.*, 9 Paige, 388; *Bouton v. City of Brooklyn*, 15 Barb. 375; *Scott v. Onderdonk*, 14 N. Y. 9; *Haywood v. City of Buffalo*, Id. 534; *Crooke v. Andrews*, 40 id. 547; Laws of 1882, chap. 410, §§ 926, 941; *In re E. I. S. Bank*, 75 N. Y. 289; *Coæ v. Clift*, 2 id. 122; *Ward v. Dewey*, 16 id. 519; *Hatch v. Buffalo*, 38 id. 276; *Newell v. Wheeler*, 48 id. 486; *Rumsey v. Buffalo*, 97 id. 114.)

PECKHAM, J. The plaintiffs commenced this action in November, 1891. They allege that an assessment was levied upon their property for the purpose of obtaining payment of its proportion of the expenses of macadamizing One Hundred and Forty-fifth street with a Telford Macadamized roadway from Seventh avenue to the Boulevard. They allege that the assessment was void for the reason that the work was done by day's work without proper authority from the common council to thus do it, and that such invalidity would not appear upon the face of the proceedings and required evidence extrinsic therefrom in order to prove the facts constituting the invalidity of such assessment. The work was done between December, 1873, and May, 1876. Plaintiffs allege that in November, 1890, the defendants, through their proper officers, commenced proceedings looking towards the collection of the assessment on the lots owned by the plaintiffs, and that the proceedings, if continued, would result in a sale of their premises and the giving of a lease to the purchaser, which lease would be *prima facie* evidence of the regularity of all proceedings prior to the giving thereof. They demand judgment that the assessment be declared void, unlawful and uncollectible, and that the defendants should be declared to have no legal right to enforce the claim by the sale of the premises of plaintiffs or otherwise against them; also, that the defendants should be perpetually enjoined and restrained

from collecting the assessment, or any part thereof, against the premises of the plaintiffs, or in any other manner attempting to enforce the same. The work, for a portion of the expenses of which this assessment was laid, was under examination in this court in the *Matter of the Petition of the Emigrant Industrial Savings Bank* (75 N. Y. 388), and it was there held that an assessment in all respects similar to this was illegal, in that the common council had not proceeded in authorizing the work in the manner provided by statute. It would not, therefore, seem that the plaintiffs stood in much danger from proceedings looking towards the sale of these premises on account of this assessment after the decision of this court in the above-cited case. Nevertheless, the counsel for the plaintiffs has thought it proper to bring this action for the purpose indicated. We are met by the objection on the part of the defendant that the Consolidation Act has deprived the plaintiffs of this remedy, and also by the objection that the record of the assessment and the proceedings relative thereto show the facts which the plaintiffs claim render the assessment void, and as these facts thus appear upon the face of the record, no action of this nature will lie to set the same aside. The first objection is sufficient.

By section 879 of the Consolidation Act it is provided: "No suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall be confined to their remedies in such cases to the proceedings under this title." The sections subsequent to section 897 provide for summary proceedings in the way of a petition to the court, which are calculated to give relief in substantially all cases. It has been held that this section of the act is not limited to any special class of assessments such as are apparent liens, but that it applies to every assessment. (*Mayer v. Mayor, etc., of N. Y.*, 101 N. Y. 284; *People ex rel. v. Myers*, 135 id. 465.)

By the plaintiffs' demand for judgment they ask in so many

words that the assessment in question shall be declared void, unlawful and uncollectible, which is but another way of asking that the assessment shall be vacated. That portion of the relief is clearly not to be granted in the face of the section of the Consolidation Act above referred to.

The further relief demanded by the plaintiffs is that the defendant be perpetually enjoined from collecting this assessment, or any part thereof, against the premises of the plaintiffs, or in any other manner attempting to enforce the same. That would seem to be but another mode of expressing by different language the same idea and seeking substantially for the vacation of the assessment. The plaintiffs' counsel claims, however, that he seeks to enjoin the sale of the premises by virtue of this assessment and the giving of a lease consequent upon such sale, because by virtue of the statute which provides that the lease shall be *prima facie* evidence of the regularity of the proceedings prior thereto, a further cloud would be placed upon the title of the plaintiffs to their premises, and that such relief enjoining the placing of such cloud upon their premises, the court has power to grant notwithstanding the statute above mentioned. He claims that upon this ground the action is not one to set aside or vacate an assessment or to remove a cloud upon title, and that it is only those two things which are prohibited by the above section, and that the jurisdiction of the court to prevent the creation of a cloud is a distinct and separate jurisdiction not prohibited by the statute in question and still existing by virtue of the general jurisdiction of a court of equity.

If the plaintiffs were right in this contention the statute would be largely shorn of its usefulness and the scheme of the legislature, as evidenced by the succeeding sections of the statute, would be very largely limited and rendered to that extent inefficient. We are of the opinion that the statute ought not to be so interpreted. It was intended to prevent the vacation of any assessment or the removal of any cloud upon title by any suit or action in the nature of a bill in equity, and it was intended to confine owners of property in

cases of alleged void assessments to their remedies provided in the succeeding sections of the title in question. It did not, of course, affect them in their defense when their property was levied upon or their right to remove an apparent lien by paying the tax and then suing to recover it back. To enjoin proceedings for the sale of this property and for the giving of a lease to the purchaser at such sale on the ground that the assessment itself was void, would be in substance a vacating of the assessment and as such a violation of the section. If the assessment were not void, it is not claimed that there would be any right to enjoin the sale or the giving of the lease consequent thereon. The plaintiffs' cause of action is founded upon the allegation that the assessment is void, although the evidence to prove such invalidity is to be found outside of the record itself. The relief sought is in substance a vacation of the assessment. The case of *Lennon v. The Mayor* (55 N. Y. 361) is not an authority in the plaintiffs' favor. In that case the assessment as originally laid was void and a sale was made of the premises under that void assessment, but no lease had been executed at the time the action was commenced. The plaintiff asked to have the assessment set aside, the sale canceled and the execution of the lease to the purchaser enjoined. It appeared upon the trial that, subsequent to the sale under it, the assessment had been validated by an act of the legislature. It was held that the act validating the assessment rendered it good from the time the statute was enacted but did not render the sale under the void assessment a valid one. The court, therefore, refused to set aside the assessment because it was not any longer void, but it canceled the sale and enjoined the execution of a lease under it, because the sale was founded upon an assessment which at the time the sale took place was void. Nothing in that case furnishes ground for the argument here that the court in construing this section (879) of the Consolidation Act, ought to distinguish between an action for the vacation of an assessment or for the removal of a cloud upon title on the one hand, and upon the other hand an action to restrain the crea-



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tion of a cloud upon title, founded upon an allegation that the assessment was itself void. With regard to this particular statute and upon these facts there is no such distinction.

We think the court had no jurisdiction of this action and the judgment dismissing the complaint should be affirmed, with costs.

All concur.

Judgment affirmed.

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FOO LONG, Appellant, v. THE AMERICAN SURETY COMPANY,  
Respondent.

The liability of a surety upon an undertaking, in the form prescribed by the Code of Civil Procedure (§§ 1352, 1356), given to stay proceedings on appeal from a final judgment to the General Term of the Supreme Court, is not terminated by the reversal of the judgment by the General Term, but continues and is enforceable in case of the ultimate affirmance of the judgment by this court on appeal from the order of General Term. Upon appeal to the General Term from a judgment in favor of plaintiff on trial at Circuit such an undertaking was given. The judgment was reversed and a new trial granted. After an appeal to this court from an order of General Term, and after a return had been made and the appeal noticed for argument, the parties stipulated that a judgment should be entered reversing the order of the General Term and affirming absolutely the judgment. On reading and filing said stipulation this court, without argument or consideration of the case on its merits, reversed the order and affirmed the judgment. The usual remittitur was sent down and judgment entered in accordance therewith. In an action upon the undertaking, *held*, that there was not an affirmance of the original judgment within the true intent and meaning of the undertaking, but in substance the original judgment was reinstated by consent of the parties; that the undertaking referred to a reversal or dismissal of the appeal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent.

Reported below, 76 Hun, 264.

(Argued May 2, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 16, 1894, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court and also affirmed an order denying a motion for a new trial.

This was an action upon an undertaking given on appeal.

The plaintiff Foo Long recovered a judgment against Chu Fong at a trial at Circuit on the 28th of June, 1888, for the sum of \$3,798.99. The defendant therein appealed to the General Term, and on the appeal the defendant in this action became the surety for the defendant. The undertaking subscribed by the defendant was in the form prescribed by the Code, by which it undertook and agreed that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding five hundred dollars, and also if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant would pay the sum directed to be paid by the judgment or the part thereof as to which the judgment should be affirmed. The General Term, after argument, reversed the judgment recovered by the plaintiff at the Circuit and granted a new trial, and the order of reversal was entered July 9, 1889. In September following the plaintiff appealed from the order of reversal and for a new trial to the Court of Appeals, and a return was made to that court and the appeal noticed for argument and placed on the calendar, but several months before it would have been reached in due course a stipulation was made between the parties to the action and their attorneys, by which it was consented that a judgment should be entered reversing the judgment and order of the General Term, and affirming absolutely the judgment of the Circuit. This consent was brought to the attention of the Court of Appeals, and on the 12th of January, 1891, the court on reading and filing the stipulation adjudged without any argument or consideration of the appeal on the merits that the judgment and order of the General Term should be, and the same was reversed, and that the judgment of the court on the verdict should be, and the same was affirmed absolutely. The usual remittitur was sent down, and judgment was entered in the Supreme Court in accordance therewith. This action was subsequently brought by the plaintiff against the present defendant on the undertaking given on the appeal to the Gen-

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eral Term. The defendant put in issue its liability on the undertaking, and on the trial the judge directed a verdict for the defendant on the ground that no breach of its conditions had been shown, and that the reversal of the order of the General Term, by consent, and the judgment of affirmance entered on the remittitur of the original judgment was not an affirmance within the true meaning of the bond. Judgment was entered in accordance with the decision at the Circuit, which was affirmed by the General Term, and from such affirmance the plaintiff appeals to this court.

Other facts are stated in the opinion.

*Charles J. Buchanan* for appellant. The defendant, whose business is to give undertakings for a consideration, receiving an indemnifying deposit of money in hand, does not stand in the favored position in which the law puts sureties in general, and it cannot resist payment unless it shows damage. (*Conner v. Reeves*, 103 N. Y. 527; *Sternbock v. Evans*, 122 id. 552.) An indemnified surety in an action may not make the obtaining of his consent to a settlement a condition precedent to the validity of his undertaking in case of a settlement. (*Cutter v. Evans*, 115 Mass. 27; *Chase v. Berand*, 29 Cal. 138.)

*S. B. Brownell* for respondents. The defendant was discharged from all liability on the undertaking by the action of Foo Long in entering judgment of reversal of the order for a new trial, upon Chiu Fong's consent. (*Roberts v. Baumgarten*, 126 N. Y. 320; *Conner v. Reeves*, 103 id. 527; Story's Eq. Juris. § 324; Willard's Eq. Juris. 133; *Miller v. Stewart*. 9 Wheat. 681.)

ANDREWS, Ch. J. The undertaking bound the surety in case of the ultimate affirmance of the judgment. Its liability was not terminated by the reversal of the judgment by the General Term, but continued and was enforceable in case, on appeal to this court, the order of the General Term should be reversed and the original judgment affirmed. (*Robinson v. Plimpton*, 25 N. Y. 484.) The only question presented by

this record is whether the original judgment was affirmed within the true intent and meaning of the undertaking. The plaintiff Foo Long appealed to this court from the order of the General Term reversing the judgment against Chu Fong in his favor and granting a new trial, giving the usual stipulation. This court by its judgment and order, entered January 12, 1891, reversed the order and judgment of the General Term and affirmed the original judgment. The judgment recited that it was entered upon the stipulation of the parties to the appeal. It appears that the stipulation was made by the parties and their attorneys, and upon filing the stipulation, and upon application to the court made before the case was reached on the calendar, the court, without argument or consideration of the case upon its merits, directed the judgment above mentioned. Judgment in conformity with the direction of the court was entered in the court of original jurisdiction, and this action was subsequently commenced against the defendant on the undertaking. In substance the original judgment was reinstated by the consent of the parties thereto. Chu Fong, the defendant, in the judgment consented to forego the advantage secured by the reversal by the General Term, and to have restored the original judgment against himself, thereby relieving Foo Long from the hazard of his appeal and depriving himself of the chance of securing, by an affirmance in this court of the order of the General Term, judgment absolute in his favor. We are of the opinion that the verdict was properly directed for the defendant. The obligation of a surety is to be determined by the terms of his contract, construed if ambiguous in the light of the surrounding circumstances. The defendant, at the request of Chu Fong, executed the undertaking. It recites that Chu Fong, feeling aggrieved by the judgment against him, intends to appeal therefrom to the General Term. The appeal was taken to secure if possible a reversal of the judgment, and the undertaking was given to comply with the statute regulating appeals, and to stay proceedings until the hearing and decision of the appeal. It cannot be assumed there was

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any other purpose on the part of Chu Fong in giving the undertaking, or on the part of the defendant in executing it. The judgment and decision of the appellate court, in due course on the very case, was what the surety became obligated for, if the judgment appealed from should be affirmed. The plaintiff accepted the undertaking with full knowledge of its terms and purpose. The interests of the parties to the judgment were hostile, the plaintiff being interested to maintain his judgment and Chu Fong to reverse it. By giving the undertaking the latter was placed in a position to secure the decision of an appellate tribunal upon the validity of the judgment against him before further proceedings should be taken to enforce it. The defendant's undertaking was executed in view of the situation of the parties to the action at the time. The undertaking was to pay the judgment if it should be affirmed, or the appeal should be dismissed, and this, under the circumstances, referred to an affirmance or dismissal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent of parties. The plaintiff was entitled to proceed on the appeal according to the usual practice. He could take an affirmance of the judgment by default if the practice of the court permitted that to be done. But to construe the undertaking as permitting the parties to agree upon the judgment to be rendered would subject a surety to a hazard which could not, we think, have been contemplated. The present case is an apt illustration of the danger of such a construction. After the General Term had reversed the judgment Chu Fong, the principal, being insolvent, without the knowledge or consent of the surety, agrees with his adversary that he should prevail on his appeal from the order of the General Term, and they together procure a reversal of the order and an affirmance of the original judgment. It would sacrifice substance to form to hold that an affirmance obtained in this way was an affirmance within the true meaning of the undertaking. It was an affirmance by act of the parties, and not in any true or real sense an affirmance by judgment of the court. It was not the

judicial sentence upon the rights of the parties contemplated by the undertaking. The question of fraud or collusion is not presented. But it seems difficult to escape the conviction that the purpose of the arrangement was to subject the defendant to liability on its undertaking. None of the cases in the construction of bonds indemnifying against suits or judgments, or upon appeal bonds, which have come to our attention, presents the peculiar feature of this case, of a consent by a party who has succeeded on the appeal taken by him to a reversal of the judgment in his favor and to a restoration of the original judgment against him.

It was held in *Conner v. Reeves* (103 N. Y. 527), which was an action on an indemnity bond given to a sheriff on the seizure of property, indemnifying him against all suits, actions or judgments, that a judgment rendered against him by consent in good faith was *prima facie* evidence against the surety in an action upon the bond. The words of the bond in that case were very comprehensive and there was no suggestion that the judgment exceeded the legal liability of the sheriff.

In the present case the undertaking related to a specific matter, namely, the action of the court, and the principal consented to judgment against him at the instance presumably of his adversary, although the General Term had determined that the judgment which he consented should be reinstated was without legal validity. The point that the defendant was indemnified for becoming surety by Chu Fong, and if compelled to pay the judgment has in its hands a deposit out of which it can obtain reimbursement is irrelevant. The case turns upon the true construction of the contract. We hold that the *pro forma* affirmance of the judgment against Chu Fong, based exclusively on the stipulation of the parties and without any hearing or adjudication by this court on the merits, was not an affirmance within the meaning of the undertaking.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

In the Matter of the Accounting of the Executors of ANN BOLTON, Deceased.

HENRY B. BOLTON et al., as Executors, etc., Respondents, v. SARAH L. MYERS et al., Appellants.

By the will of B. the executors were empowered to sell any and all of his real estate when in their judgment they might deem it for the best interests of the estate. The executors sold the real estate; they paid, in discharge of the testator's debts, a sum in excess of that realized from the personalty. In proceedings for a final accounting by the executors, *held*, that before distributing the proceeds of the sale among the residuary devisees, they were entitled to reimburse themselves therefrom for the sum so paid in excess of the personalty, and were entitled to a credit for that sum, and this, without regard to the question as to whether the power of sale was given for the purpose of paying debts.

(Argued April 16, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1894, which reversed a judgment entered upon a decree of the surrogate of Westchester county settling the accounts of the executors of Ann Bolton, deceased.

The facts, so far as material, are stated in the opinion.

*James R. Marvin* for appellants. The executors claim that they have used the proceeds of the last sale in paying the debts of Ann Bolton. This they had no right to do. The will of decedent does not charge the payment of her debts upon the realty, nor does it direct or authorize a sale of the realty for the payment of debts. That being the case, the only manner in which the realty could be applied to the payment of debts was by a proceeding for its sale, for payment of debts under the statute for that purpose, and that proceeding must have been taken within three years after the issuing of letters testamentary. (Code Civ. Pro. § 2750; *Farkinson v. Jacobson*, 18 Hun, 353; *Slocum v. English*, 62 N. Y. 494; *Platt v. Platt*, 105 id. 497; *Rogers v. Patterson*, 29 N. Y.

Supp. 963; *In re McComb*, 117 N. Y. 378; 50 id. 431; 36 id. 581; 116 id. 144; 42 id. 531; 110 id. 159; 4 Hill, 50; *Bevan v. Cooper*, 72 id. 317.) A power to an executor to sell real estate as he shall deem expedient and for the best interest, etc., is a general power in trust in which the executor has no interest. (*Russell v. Russell*, 56 N. Y. 581.) The services of Thain and Salter rendered on the former accounting were adjusted and allowed at the statutory rates by the former decree. The surrogate has no power to go behind that decree and make an additional allowance for that proceeding in this proceeding. (*Reed v. Reed*, 52 N. Y. 652; 1 Dem. 103.)

*Alex Thain* for respondents. The appellants are estopped from changing their position to the prejudice of the executors. (Bigelow on Est. 717; 2 Herman on Est. § 733 *et seq.*; 7 Am. & Eng. Ency. of Law, 32, § 6; *Garnar v. Bird*, 57 Barb. 277.) The power of sale in the will was not only valid, but its exercise probably not even discretionary, and imposed an imperative duty upon the executors to sell the real estate. (*In re Gantert*, 136 N. Y. 106; *Cahill v. Russell*, 140 id. 402; Code Civ. Pro. § 2759.) By every principle of equity the executors, having acted in good faith, are to be protected from loss in seeking to carry out the trusts imposed upon them. (2 Wait's Act. & Def. 163.) It is not necessary that the proceedings be remitted to the surrogate. (Code Civ. Pro. §§ 1347, 2586, 2587.)

O'BRIEN, J. In this proceeding it was held by the learned surrogate that the executors were not entitled to reimburse themselves out of the proceeds of the sale of real estate in their hands for the amount paid by them in discharge of the debts of the testatrix over and above the sum realized for that purpose from the personal estate. The testatrix died September 27, 1882, and letters were granted to the executors in November following. In November, 1892, the executors accounted and by the decree then entered it was adjudged that



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the estate was indebted to them on account of debts of the testatrix paid by them in default of personal assets in the sum of about \$4,000.

Subsequently there came to the hands of the executors a large sum received from the sale of certain real estate of the deceased, and the present accounting was in regard to that fund, and the executors claim that they should be allowed to retain sufficient of it to pay the debt due to them from the estate.

The provisions of the will are as follows: After paying debts a bequest of certain household furniture to her daughter. Then a devise to her son of the house in which he lived. The executors were directed to invest \$1,500, the interest upon which was to be paid to a church, and to expend a reasonable sum in erecting a monument and putting the family cemetery in order. Then follows the power of sale in the following terms: "And I also give power and authority to my executors to sell any and all of my real estate, either at public or private sale, whenever in their judgment they may deem it for the best interest of my estate, and to give good and sufficient deed or deeds of conveyance for the same."

The residue of the estate was then bequeathed to her children. In the courts below the right of the executors to enforce their claim in this proceeding is made to depend upon the scope and character of this power. It has been assumed in both courts that unless this can be regarded as a power to the executors to sell real estate for the payment of debts, then the proceeds of the sale must still be regarded as real estate, and distributed to the devisees or persons who take the real estate under the will.

The learned General Term, reversing the surrogate, was of the opinion that it should be treated as a power of sale for the purpose of paying debts, upon the doctrine of the *Gantert* case (136 N. Y. 109). If it was necessary to establish that proposition there would be great difficulty in sustaining the judgment. But we think it is not material to determine the character of the power.

It was certainly a general power, and conferred authority upon the executors to convey the land and receive the proceeds. That power has been actually executed. They have conveyed the land, have received the purchase price, and the same is in their hands. There is no other way in which creditors can now reach the land except by proceedings for an accounting. The realty has in fact been converted into personalty, and is in the hands of the executors for all purposes of administration. Before distributing this fund to the residuary devisees they may pay the balance of the testator's debts, or what is the same thing, reimburse themselves for the debts they have paid in excess of the personal estate that came to their hands. (*Erwin v. Loper*, 43 N. Y. 521; *Hood v. Hood*, 85 id. 561; *Glacius v. Fogel*, 88 id. 434; *Matter of Powers*, 124 id. 361; *Matter of Gantert*, 136 id. 100; *Cahill v. Russell*, 140 id. 402.)

In this view we think the judgment of the General Term was right, and should be affirmed, with costs.

All concur.

Judgment affirmed. \_\_\_\_\_

146	260
150	334

GEORGE H. HEATH, Appellant, v. NEW YORK BUILDING LOAN BANKING COMPANY, Respondent.

After entry of judgment in an equity action on findings of fact and conclusions of law, the Special Term, which tried the action, has no power on motion for a re-settlement of the findings and conclusions to make amendments therein, altering the decision on the merits and changing the substantial rights of the parties.

The authority given to the court by the Code of Civil Procedure (§ 723) to make amendments is confined to such as do not affect the substantial rights of the parties.

(Argued May 20, 1895; decided May 28, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 14, 1895, which reversed an order of Special Term re-settling the findings of fact and conclusions of law on trial at Special

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Term and modifying a judgment in favor of defendant entered upon such findings and conclusions.

The nature of the action and the facts, so far as material, are stated in the opinion.

*A. J. Perry* for appellant. The power of the court to amend, change and control its own acts and records is inherent. It is also statutory. (Code Civ. Pro. § 723.) It is also *stare decisis*. (*Bohlen v. M. E. R. R. Co.*, 121 N. Y. 546.)

*William H. Hamilton* for respondent. The order is not appealable. (*Randall v. Packard*, 142 N. Y. 47; *Shuttleworth v. Winter*, 55 id. 624; *Tyng v. Halsted*, 74 id. 604; *Quincy v. Young*, 53 id. 504; *Van Slyke v. Hyatt*, 46 id. 259.) The learned justice had no jurisdiction to make the order reversed by the General Term. (*Rockwell v. Carpenter*, 25 Hun, 530; *Kamp v. Kamp*, 59 N. Y. 212; *McLean v. Stewart*, 14 Hun, 472; *Clark v. Hall*, 7 Paige, 382; *Adams v. Ash*, 46 Hun, 110; *Gasz v. Strick*, 19 N. Y. S. R. 315; *Whiteside v. N. C. Assn.*, 68 Hun, 568; *Parker v. Linden*, 59 id. 359; Code Civ. Pro. § 723; *Bohlen v. M. E. R. R. Co.*, 121 N. Y. 546; *Hotaling v. Marsh*, 14 Abb. Pr. —; *Palmer v. Ins. Co.*, 22 Hun, 224; *Morgan v. Taylor*, 23 N. Y. S. R. 960; *Gormerly v. McGlynn*, 84 N. Y. 284; *F. Nat. Bank of West Troy v. Levy*, 41 Hun, 461.) Plaintiff's affidavit of August sixth gave no support to the order of Justice GAYNOR. (*Jacobs v. Morange*, 47 N. Y. 57; *Weed v. Weed*, 94 id. 243-247.) The judgment itself was originally right and just. (*Boone v. H. L. Assn.*, 51 N. Y. S. R. 63; *Marks v. M. C. P. S. & L. Assn.*, 52 id. 451.)

BARTLETT, J. The plaintiff is a stockholder in the defendant company, and as a borrower of money therefrom, sued to have declared fraudulent and void a deed, mortgage and agreement, and that he be allowed to rescind the same by paying the amounts advanced by defendant less sum paid by plaintiff for the stock of defendant and fees paid defendant for making the loan.

The defendant interposed a defense, not material to consider in detail at this time, and set up a counterclaim; on the trial the plaintiff failed to prove his cause of action and his complaint was dismissed.

At the close of plaintiff's case it only remained for defendant to prove the amount due to it from plaintiff, which was accordingly done.

Thereupon the court found, among other things, that there was due from plaintiff to defendant \$8,014.66, together with certain amounts of fines and interest.

Then followed the legal conclusions, among others, that if plaintiff paid these amounts within six months from entry of judgment he should receive a re-conveyance of his property subject to certain liens, and the agreement or lease and shares of stock were to be canceled.

If the plaintiff failed to pay these amounts within the time indicated he was to be barred and foreclosed of his rights, the premises sold, and proceeds brought into court and applied in the usual way.

Judgment was entered in accordance with these findings and conclusions.

After the time to appeal from the judgment had expired, the plaintiff procured from the justice who tried the case an order, returnable before him at Special Term, requiring the defendant to show cause why the findings of fact and conclusions of law should not be re-settled, on the ground, among others, that his own attorney did not give his case due attention, and that a judgment was entered against him for upwards of eight thousand dollars, which, as to thirty-eight hundred dollars of it, was without consideration and without warrant in the testimony, and if warranted by the testimony, the "said amount of \$3,800.00 is only a name without a substance, and if a substance it is usury."

The Special Term heard the motion, reduced the amount found to be due from plaintiff to defendant from \$8,014.66 to \$5,217.99, and amended the findings, conclusions and judg-

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ment to conform to this new and extraordinary adjudication upon the rights of the parties.

At the trial the defendant, by uncontradicted evidence, received without objection, had proved the amount due from plaintiff.

We agree with the learned General Term that the amendment made corrected no clerical error — no mistake of computation, but changed the substantial rights of the parties.

It would be a most dangerous precedent if such a wide departure from due and orderly procedure, as is here disclosed, should be permitted.

The contention of plaintiff's counsel that section 723 of the Code of Civil Procedure allows such a motion to be made is a mistake.

This section was designed to confer upon courts the amplest power to correct mistakes in process, pleadings and in all other respects, so long as the substantial rights of parties are not affected. (*Bohlen v. Met. El. Ry. Co.*, 121 N. Y. 546-550.)

In the case at bar a decision upon the merits was altered and defendant's recovery reduced by a very considerable amount.

The plaintiff was not remediless in the situation in which he found himself, assuming there was merit in his contention, but he mistook his remedy when he resorted to the motion now under review.

The defendant cannot be subjected to a reduction in the amount of its original recovery and a radical change in the rulings of the court on the questions presented, except upon a new trial.

We express no opinion as to the merits, placing our decision solely on the ground that the Special Term had no power to entertain this motion.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

In the Matter of ROBERT W. BUCHANAN, a Defendant Sentenced to the Penalty of Death, etc.

An appeal direct to the United States Supreme Court is not authorized either by the United States Revised Statutes or the act of congress of 1891 (Chap. 517, Laws of 1891), creating Circuit Courts of Appeal, from a decision of a judge of a District Court at Chambers, denying an application for a writ of habeas corpus.

Such an appeal, therefore, does not operate as a stay, and where the writ was applied for in case of one imprisoned under judgment of a state court finding him guilty of murder and sentencing him to death, it furnishes no reason for delaying the execution of the sentence.

*It seems*, it was not the purpose of the fourteenth amendment to the United States Constitution, declaring that no state shall "deprive any person of life, liberty or property without due process of law," to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of those courts over crimes and offenses, defined and declared by its laws, and committed within its territorial jurisdiction.

*It seems*, also, that while in case of accusation of crime the accused is entitled to an inquiry, a hearing and a judgment before he can be deprived by sentence of his liberty or life, within these limitations what constitutes "due process of law" is to be determined by the state in every case where it can exercise rightful authority, and said amendment confers no jurisdiction upon the Federal courts to supervise the administration by state tribunals of the criminal law of the state, to correct errors committed on trial, or to modify or change their judgments.

A reprieve to a day certain granted by the governor in a capital case, which day is beyond the week in which, by order of the court, the execution was to take place, does not render it necessary to have the prisoner brought before the court to have the time of execution again fixed, but authorizes the execution of the sentence on the day on which the reprieve terminates.

The distinction between a reprieve and a suspension of sentence pointed out. The provisions of the Code of Criminal Procedure (§§ 503, 504) providing that when a person sentenced to death has not, for any reasons save those specified, been executed pursuant to the sentence at the time specified, and the judgment inflicting the sentence stands in full force, such person shall be brought before one of the courts specified and the day for the execution of the sentence again fixed, does not apply in the case of a reprieve, unless the day fixed thereby has passed and the sentence has not been executed, in which case the provisions are applicable.

(Argued May 20, 1895; decided May 28, 1895.)

MOTION for an order directed to the agent and warden of the state prison at Sing Sing, in whose custody Robert W. Buchanan is, commanding that he be brought before the Court of Appeals in order that it may inquire into the circumstances, and, if no legal reason exists, direct the execution of his sentence.

This is an application of the district attorney of the city and county of New York under section 503 of the Code of Criminal Procedure, for an order to bring Robert W. Buchanan before this court to the end that a warrant be issued under section 504, commanding the agent and warden of the state prison at Sing Sing to do execution of the sentence of death heretofore pronounced against him. Buchanan on the 10th day of August, 1893, was convicted in the Court of General Sessions of the Peace in and for the city and county of New York of the crime of murder in the first degree, and was sentenced to the punishment of death, the sentence to be executed during the week commencing October 2nd, 1893. Appeal was taken by the defendant to this court from the judgment of conviction and the court affirmed the judgment February 26th, 1895. The original time fixed for the execution of the defendant having passed before the affirmance of the judgment in this court, he was thereafter brought before the Court of Sessions, in which the trial was had, and a warrant was issued commanding execution of the sentence during the week commencing Monday, April 23d, 1895. Before the time appointed for the execution of the sentence and on the 11th of April, 1895, counsel for the defendant applied upon his petition to Judge Brown, one of the associate justices of the Supreme Court of the United States, praying that a writ of error and supersedeas might issue out of that court to the Court of General Sessions of the city and county of New York. The petition for the writ set forth the facts of his conviction; the affirmance of the judgment by this court; the re-sentence, and alleged as the grounds of the application (1) that the life of the petitioner was sought

to be taken without due process of law, and (2) that he was not tried by an impartial jury.

In support of these general allegations the petition set forth what occurred on the trial in connection with the juror Paradise, and it was alleged that he was physically and mentally incapacitated to take part in the deliberations of the jury and from participating in the verdict, and that the verdict by reason thereof was the verdict of eleven jurors only. Judge BROWN referred the application to the full bench of the Supreme Court, which court after hearing counsel and on the 16th day of April, 1895, denied the application for the writ on the ground that the petition did not disclose any Federal question or any denial of due process of law, the competency of the juror being a matter within the sole cognizance of the state tribunals. On Tuesday, the 23d day of April, 1895 (during the week appointed for the execution of the sentence), the execution not having taken place, the governor of the state, upon application of the friends of the defendant and persons interested in his behalf, granted a respite of execution until May 1, 1895. On the 29th day of April, 1895, the defendant, through his counsel, applied to Judge ADDISON BROWN, judge of the United States District Court for the southern district of New York, at Chambers, for a writ of habeas corpus. The petition alleged that the defendant was illegally and unlawfully restrained of his liberty in violation of the statute and laws of the United States, and of the statutes of this state, and of the treaty between the United States and England, and that his trial and conviction was in violation of said statutes and laws and of said treaty, and of the Constitution of the United States. The petition was based upon two assertions: (1) That the juror Paradise did not possess the qualifications of jurors specified in the state statutes, in that he was not in possession of his natural faculties nor of sound judgment, and (2) that the threat to execute the defendant on the 1st day of May, 1895, the day to which the execution has been respited, was in violation of law, for the reason that a respite by the governor did not authorize the



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Statement of case.

execution of a death sentence on the day when the respite terminated, and that a new day could only be fixed by the court on application and under the sections of the Code of Criminal Procedure before referred to. Judge BROWN refused to grant the writ and indorsed on the petition a statement that he found therein "no legal reason for entertaining or further considering the application." No formal order was entered denying the writ, nor any other entry of the decree made. Thereupon, on the same day (April 29th), the counsel for the defendant prepared and caused to be filed in the office of the clerk of the District Court a notice of appeal from the decision of Judge BROWN, entitled in the proceeding, to the Supreme Court of the United States, on which was indorsed by the clerk, "Notice of appeal filed April 29, 1895." It appears that on the 30th of April one of the defendant's counsel presented to the clerk of the United States Supreme Court in Washington a document which purported to be a transcript of the record of the proceedings before Judge BROWN. The clerk refused to receive or file the papers, on the ground that no appeal had been allowed, and informed the counsel that he could apply for an allowance to a judge of the Supreme Court or to the court which was then in session. But no further application appears to have been made.

The governor of the state on May 1, 1895, granted a further respite to Wednesday, May 8th. Meanwhile a question had been raised as to the effect of the appeal on the habeas corpus proceeding to the Supreme Court of the United States, and whether it operated as a stay of proceedings until the appeal was heard and determined. The question was informally presented to the attorney-general, and the practice and law being unsettled he advised that the opinion of the court should be taken. This involved a further postponement of the execution of the sentence, and the day of the second respite having expired and no time thereafter being fixed for its execution, this present application was made.

*John R. Fellows* and *John D. Lindsay* for application. The application should be granted. (Code Crim. Pro. § 503.)

The contention that the supposed appeal in the habeas corpus proceedings in the District Court operates as a stay of proceedings and renders any further action in the state courts null and void is untenable. (U. S. R. S. §§ 735, 751, 752, 753, 763-765, 766; 139 U. S. 705; *Nishimura Elkin v. United States*, 142 id. 651; *Lanow Bew v. United States*, 144 id. 47; *Horner v. United States*, 143 id. 570; *Cross v. Burke*, 146 id. 82; *In re Lennon*, 150 id. 397.) No appeal would lie from Judge BROWN's decision even had an order been entered formally expressing his action. (*Lambert v. Barrett*, U. S. Sup. Ct., Apr. 15, 1895.)

*George W. Gibbons* and *Daniel T. Kimball* opposed. The application should not be granted; there is an appeal to the United States Supreme Court, all the requirements of law have been complied with, and it operates as a stay of execution. (*Hudgriss v. Kemp*, 18 How. [U. S.] 530; *Ex parte Whitton*, L. R. [13 Ch. Div.] 881; *Estey v. Sheckler*, 36 Wis. 437.)

ANDREWS, Ch. J. This application must be granted "if no legal reason exists against the execution of the sentence." (Code Crim. Pro. § 504.) The only suggestion made by counsel for the defendant containing a semblance of a legal reason against granting the application is that the appeal to the United States Supreme Court, taken on the 29th day of April, 1895, from the decision of the district judge denying the writ of habeas corpus, operated to suspend all proceedings and deprived the state courts of any power to act in the premises until the appeal shall be heard and determined. There is no ground for such a contention. That appeal has not only never been perfected by obtaining an allowance thereof (assuming that such an appeal would lie), but it was wholly inoperative and ineffectual, for the reason that under the statutes of the United States no appeal can be taken to the Supreme Court from an order made by a district judge at Chambers in a habeas corpus proceeding. Prior to the act of

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Congress, chap. 517 of the Laws of 1891, passed March 3, 1891, entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," appeals in habeas corpus proceedings before Federal officers or courts were regulated by the provisions of chap. 13 of the Revised Statutes of the United States (§§ 751 to 766). The Supreme Court and the several Circuit and District Courts, and the several justices and judges thereof within their respective jurisdictions, had power to issue the writ, and from the final decision of any court, justice or judge inferior to the Circuit Court upon an application for the writ, or upon the writ when issued, an appeal could be taken to the Circuit Court for the district in which the cause was heard in the case of any person alleged to be restrained of his liberty in violation of the Constitution of the United States, or of any law or treaty of the United States, and in a case involving a question under the law of nations (§ 763). But no appeal could be taken from the decision of an inferior court or judge directly to the Supreme Court. The only appeal permitted to the Supreme Court was from the final decision of a Circuit Court (§ 764). Pending an appeal authorized by sections 763 and 764, and, until final judgment therein, in a case where the imprisonment under review was under state authority, any proceeding in the matter, in a state court, was by section 766 declared to be null and void. Under the provisions of the Revised Statutes, therefore, the appeal sought to be taken in the present case directly from the decision of the district judge to the Supreme Court would have been unauthorized. Such appeal could not have been taken either from the decision or order of the District Court or of a judge of that court. The act of 1891, which created Circuit Courts of Appeal, changed to some extent the pre-existing system regulating appeals from District Courts. The 5th section authorizes appeals or writs of error to be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court in particular cases, and among

others a case involving the construction or application of the Constitution of the United States. It is the judgment and decision of a District Court, in one of the cases specified, which may be reviewed on direct appeal to the Supreme Court under this section. The section does not authorize such an appeal from an order or decision of a district judge at Chambers, and this is settled by repeated adjudications of the Supreme Court of the United States, the latest of which is *Lambert v. Barrett* (157 U. S. 697), decided at the October term, 1894, which was an appeal from the order of a circuit judge denying an application for a writ of habeas corpus in case of a person under conviction for murder by the courts of New Jersey. The Supreme Court dismissed the appeal, FULLER, Chief Justice, saying: "But this is an order of the circuit judge at Chambers, and an appeal from such an order will not lie," citing *Carper v. Fitzgerald* (121 U. S. 87); *In re Lennon* (150 id. 393), and *McKnight v. James* (155 id. 685).

It is manifest, in view of these decisions, that the attempted appeal to the Supreme Court from the denial by the district judge of the writ of habeas corpus was a nullity. The appeal was unauthorized. The Supreme Court acquired no jurisdiction, and it is needless to say that an appeal not allowed by law to a court which had no power to entertain it could not operate as a stay, and furnishes no reason for delaying the execution of the sentence.

We might here close the consideration of this case. But this court had occasion in the case of *The People v. Jugiro* (128 N. Y. 589) to allude to the practice of invoking the processes and procedure of the courts of the United States in respect of judgments of the state courts, for mere purpose of delay, and which has brought scarcely less than a scandal upon the administration of the criminal law of this state. The applications to the United States courts after convictions for murder in the state court, have been under pretext of the new jurisdiction conferred upon the Federal courts by the 14th amendment of the Constitution of the

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United States and generally under that clause which declares "Nor shall any state deprive any person of life, liberty or property without due process of law." But it was not the purpose of this amendment to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of the courts of a state over crimes and offenses defined and declared by its laws and committed within its territorial jurisdiction. The phrase "due process of law" used in the Constitution, came to us from our English ancestors. The Constitution secures the citizen against any exercise of merely arbitrary power, and protects him from a violation by a state of these cardinal rights which are included in every definition of civil liberty. In case of accusation of crime the accused is entitled to an inquiry, a hearing and judgment before he can be deprived by sentence of his liberty or life. But "due process of law" and what constitutes it, is, within the limitation mentioned, to be determined by the state in every case where the state can exercise rightful authority. The jurisdiction over crimes, save in exceptional cases, not necessary now to be mentioned, is a state and not a Federal jurisdiction. The state constitutes appropriate tribunals for the trial of offenses and prescribes the procedure for the investigation, trial and punishment of crimes. That is "due process of law" within the meaning of these words, which affords to every citizen the equal protection of the laws, and in case of accusation of crime, the right of trial by jury before one of its duly constituted tribunals having jurisdiction of the crime, under a procedure which the state prescribes. The 14th amendment confers upon the courts of the United States no jurisdiction to supervise the administration by state tribunals of the criminal law of the state, or to correct errors, or to modify or change their judgments. All errors, however flagrant, which may have been committed on the trial in the drawing of jurors, or as to their competency; in the reception or rejection of evidence; in the sentence pronounced, or in any of the matters which pertain to the procedure and con-

duct of the trial, must be corrected, if at all, in the state courts. The United States courts, in general, can neither inquire as to the justice of a conviction or review the procedure on the trial, or the subsequent procedure, unless there has been no hearing, no trial and no conviction, and what has taken place is the mere semblance of a trial to cover a deprivation of liberty or life in violation of the fundamental principles of liberty and justice. The extent or limitations of the new jurisdiction devolved on the United States courts under the 14th amendment, has not yet been fully ascertained or adjudicated. But the Supreme Court of the United States has steadily and in repeated instances disclaimed jurisdiction under it to review errors assigned on trials in state courts, or to constitute itself a general court of review, and the cases must be rare and exceptional under the construction placed by the court upon the amendment which would justify an invocation of the processes and procedure of the Federal courts to arrest the execution of the judgments of the courts of a state in criminal cases. (See *Hurtado v. California*, 110 U. S. 516; *Caldwell v. Texas*, 137 id. 692; *McNulty v. California*, 149 id. 645; *In re Kemmler*, 136 id. 436; *In re Wood*, 140 id. 278.) The petition presented to the district judge in this case disclosed on its face that no Federal question was involved, and the refusal of Judge Brown to entertain the proceeding was manifestly proper. The question as to the competency of the juror Paradise to take part in rendering the verdict was raised on the prior application to the Supreme Court of the United States for a writ of error, which was dismissed by the Supreme Court expressly on the ground that the question was exclusively for the state courts. But in the petition for the habeas corpus made after the decision had been announced, the same question, though in a somewhat different form, was made one of the grounds of the application. The other point set forth in the petition, namely, that the reprieve extending to a day beyond the week in which by the order of the court the execution was to take place, made it necessary that a new time should be fixed by the court before

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the execution could be had, presented also a purely state question on the construction of certain sections of the Code of Criminal Procedure. It was a matter for the state courts to determine, and whether the proposed execution by the warden was in accordance with the law, or contrary to the law, the remedy of the defendant, if any, was in an application to the courts of the state for direction and relief.

We deem this a proper occasion to express the opinion of the judges that a reprieve by the governor to a day certain, granted in a capital case, authorizes the execution of sentence on the day on which the reprieve terminates, and that it is not necessary that the prisoner should be brought before the court to have the time of execution fixed. By section 5, article 4 of the Constitution of the state, the governor is vested with the power "to grant reprieves, commutations and pardons after conviction." The power of pardon for crimes was in England vested in the king as a royal prerogative, and the power to reprieve a prisoner under sentence was included in the power to pardon. Blackstone (4 Com. 394) defines a reprieve to mean "the withdrawing of a sentence for an interval of time whereby the execution is suspended." It operates in capital cases only. (Chitty Cr. Law, 757.) The distinction between a reprieve and a suspension of sentence, although the words are sometimes used interchangeably, is that a reprieve postpones the execution of the sentence to a day certain, whereas a suspension is for an indefinite time. (See Op. of EDMONDS, J., in *Carnal v. People*, 1 Park. Crim. Rep. 262.) The section of the Constitution referred to uses the word suspension in the clause which confers upon the governor the power to "suspend the execution of a sentence for treason, until the case shall be reported to the legislature at its next meeting." In *The People v. Enoch* (13 Wend. 159), which was an appeal in a capital case, in which the execution of the sentence had been respited by the governor, the chancellor said: "I am of opinion that in a case like the present, where the execution of the sentence is respited by the governor until a particular day, it is the duty of the sheriff to proceed and

execute the judgment of the court at that time, unless further respite is granted or the judgment has been reversed or annulled in the meantime." The same question came before the Supreme Court of Ohio in the case of *Sterling v. Drake* (29 Ohio St. Rep. 457), where the governor of Ohio, under a constitutional provision in the Constitution of Ohio, similar to the provision in our Constitution, had granted a reprieve in a capital case to a day certain, and the court held that the sheriff was authorized to proceed on that day to execute the sentence without further action of the court. The governor, under the Constitution, is vested with the prerogative to grant reprieves. This is a power to enlarge and extend the time fixed by the court for the execution of the sentence of death to a day certain in the future. The right to execute the sentence on that day inheres in the power to fix the day to which the reprieve shall extend. If, in case of a reprieve, a re-sentence is necessary, the reprieve is not to a fixed day, but to some indefinite day to be fixed by the court after the day named in the reprieve is passed.

We are of opinion that section 503 of the Code has no application to the case of a reprieve, unless, as in this case, the day fixed thereby has passed and the sentence has for any reason not been executed, although the judgment of conviction is still in full force. We think it was the duty of the warden, in whose custody the defendant was on the 8th day of May, 1895, the day on which the second reprieve terminated, to execute the sentence on that day without waiting for the order of the court.

The court, having considered the reasons presented against granting the present application, and finding in them no legal reason for further delay, has issued a warrant in conformity with section 504 of the Code of Criminal Procedure.

All concur.

Application granted.



THE MUTUAL LIFE INSURANCE COMPANY of New York,  
Appellant, v. JOHN O'DONNELL et al., Respondents.

While under the Supreme Court rules (Rule 11) an oral stipulation in respect to the proceedings in a cause is not binding and will not be carried into effect by the court, it will not permit a party to be misled, deceived or defrauded by means thereof, and in cases where it has been acted upon by the party making it, he will not be permitted to retract and take advantage of the acts or omissions of his adversary induced thereby.

*It seems*, where in such a case the question as to whether the alleged oral stipulation was made is contested, while the Special Term has power to determine it upon affidavits, where a large amount is involved and the conflict is sharp, the question should be determined upon common-law evidence.

(Argued May 20, 1895; decided May 28, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made December 9, 1892, which affirmed an order of the Special Term which granted a motion to set aside a judgment for deficiency against the defendant O'Donnell in the above-entitled action for the foreclosure of a mortgage.

The facts, so far as material, are stated in the opinion.

*David B. Hill* for appellant. The Special Term should have denied the motion upon the ground that the alleged agreement was not in writing. (*Broom v. Wellington*, 1 Sandf. 663; *Baine v. Thomas*, 2 Caines, 95; *Leese v. Schermerhorn*, 3 How. Pr. 63; *M. & H. O. Co. v. Pugsby*, 19 Hun, 282; *People v. Carey*, 5 Daly, 532; *Rust v. Hausett*, 8 Abb. [N. C.] 148; *Dubois v. Roosa*, 3 Johns. 145; *Wager v. Stickle*, 3 Paige, 406; *Gaillard v. Smart*, 6 Cow. 382; *Turner v. Burrows*, 1 Hill, 627; *Montgomery v. Ellis*, 6 How. 325; *People v. Stephens*, 52 N. Y. 306-310; *Cranford v. Lockwood*, 9 How. Pr. 547; *Martin v. Angell*, 7 Barb. 407; *Springstur v. Powers*, 3 Robt. 483; *White v. Ashton*, 51 N. Y. 280.) The judgments could not properly

be vacated upon motion, but, if at all, only by action. (*Phillips v. Wicks*, 6 J. & S. 74; *Anderson v. Carr*, 7 N. Y. Supp. 281; *Densmore v. Adams*, 49 How. Pr. 238; *Hill v. Hermans*, 59 N. Y. 396; *Montrait v. Hutchins*, 49 How. Pr. 105; *People v. E. R. Co.*, 54 id. 59; *Barron v. Sanford*, 14 id. 443; *Barber v. Case*, 12 id. 351; *Munn v. Barnum*, 2 Abb. Pr. 409; *Burnett v. Snyder*, 9 J. & S. 342; *Williams v. Irving*, 1 Hun, 720; Code Civ. Pro. § 1015; *Heath v. N. Y. B. L. B. Co.*, 84 Hun, 302; *Trenor v. LeCount*, Id. 426.)

*John C. Churchill* for respondents. The questions as to the making of the agreement relied upon by O'Donnell, that the plaintiff would bid off in each action the mortgaged property at the amount of its claim thereon, and that there should be no judgments for deficiencies, is a question of fact arising upon conflicting evidence, and which the General Term, affirming the decision of the Special Term, has decided in favor of the defendant. That decision is final and will not be reviewed by this court upon appeal. (Code Civ. Pro. § 1337; *People v. French*, 92 N. Y. 306, 310; *In re Ross*, 87 id. 514, 515; *People v. Fire Comrs.*, 106 id. 257, 262; *Duryea v. Vosburgh*, 121 id. 57, 63; *Healey v. Clark*, 120 id. 642; *Finch v. Parker*, 49 id. 1, 8; *People v. French*, 123 id. 636.) The agreement in question was valid though not in writing, as required by rule 11. It was acted upon by the defendant who, with his attorney, signed the stipulations relying upon this agreement. (*People v. Stephens*, 52 N. Y. 306, 310; *Montgomery v. Ellis*, 6 How. 326; *Turner v. Burrows*, 1 Hill, 627; *Gaillard v. Smart*, 6 Cow. 382; *Leese v. Schermerhorn*, 3 How. 63; 1 Rumsey's Pr. 219.) The agreement in question was within the authority of the plaintiff's attorney, and of Rasquin, as his recognized and confidential representative, and bound the plaintiff. (*Gaillard v. Smart*, 6 Cow. 384, 388; *Gorham v. Gale*, 7 id. 739, 744; *Mark v. City of Buffalo*, 87 N. Y. 184, 188; *Cox v. N. Y. C. & H. R. R. Co.*, 63 id. 414, 418-420; *U. Bank v. Geary*, 5

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Pet. [U. S.] 99.) The power of the court to vacate a judgment unjustly, improperly or fraudulently entered, is a common-law power inherent in the court, and possessed by it as a part of its necessary machinery, and can be exercised by it without special statutory authority. (Black on Judgments, §§ 297, 303, 321, 322; Freeman on Judgments, § 99; 4 Wait's Pr. 637, 731; *Cannan v. Reynolds*, 5 El. & Bl. 305; *Philipson v. Earl*, 6 Ad. & El. 587; *Barry v. M. L. Ins. Co.*, 53 N. Y. 536; *Dinsmore v. Adams*, 66 id. 618, 619; *In re Buffalo*, 78 id. 362, 370; *Lansing v. Orcutt*, 16 Johns. 4; *N. Y. I. Co. v. N. W. Ins. Co.*, 23 N. Y. 357, 361; *Hackley v. Draper*, 60 id. 88, 92; *Foote v. Lathrop*, 41 id. 358, 360; *King v. Platt's Exrs.*, 34 How. Pr. 26; *Howitt v. Merrill*, 113 N. Y. 630, 631; *Morgan v. Halliday*, 16 J. & S. 117, 126; *Levy v. Loeb*, 5 Abb. [N. C.] 157, 166; *People v. Hecktograph Co.*, 10 id. 358; *Vilas v. P. & M. R. Co.*, 123 N. Y. 442, 450-452; *Mayor, etc., v. Smith*, 138 id. 676; 20 N. Y. Supp. 666.)

HAIGHT, J. This action, together with seven others, was brought for the foreclosure of mortgages on property in Lowville, Lewis county, executed by the defendant O'Donnell to the plaintiff. Upon stipulation the other actions are to abide the result reached in this, so that it only becomes necessary to consider the facts as presented in this case.

The complaint expressly demanded judgment against the defendant O'Donnell for any deficiency that might arise upon a sale of the premises. O'Donnell interposed an answer in which, among other things, he alleged an extension of time of payment under a verbal agreement with the plaintiff, and denied that any sum was due for principal or interest. After issue was thus joined and before the time set for the trial of the action, O'Donnell wrote the plaintiff a letter in which he offered to allow judgment to be perfected at once upon certain conditions therein enumerated. Upon the receipt of the letter the plaintiff sent William Rasquin, Jr., an attorney and managing clerk in the office of the plaintiff's attorney of

record in the action, to Lowville to obtain the necessary stipulations and consent to enter judgment. Upon arriving there Rasquin had an interview with the defendant O'Donnell, which resulted in his signing a written stipulation embracing the propositions contained in his letter, and his attorney, Mr. Hilts, who interposed the answer, also signing a stipulation in the action formally withdrawing the answer and waiving the service of all papers, except notice of sale and as to surplus. Thereupon Rasquin, upon an affidavit of regularity and the stipulation of the defendant's attorney, moved at a Special Term for an order of reference to compute the amount due, which motion was granted and a reference had in which it was determined by the report that the amount due and unpaid in this action was the sum of \$5,205.82; upon which report judgment of foreclosure and sale was subsequently entered by direction of the court, in which it was specifically adjudicated that, "if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, the said sheriff specify the amount of such deficiency in his report of sale, and that the defendant John O'Donnell pay the same to the plaintiff." Upon the sale the premises were struck off to the plaintiff for the sum of \$4,000, and the sheriff reported a deficiency of \$1,475.50, for which amount a deficiency judgment was entered. The defendant O'Donnell thereafter, upon affidavits tending to show an oral stipulation of the attorney, Rasquin, to the effect that the plaintiff, upon the sale of the premises under the judgment, would bid the amount of the judgment and costs made at the time of the making of the stipulation to withdraw the answer, moved the court at a Special Term for an order vacating and setting aside the deficiency judgment entered herein. This motion was granted.

Can the order so made be sustained? As we have seen, the judgment for the foreclosure and sale was entered after the making of the alleged oral stipulation, and in the judgment it is expressly adjudged that the defendant O'Donnell shall pay any deficiency that may arise upon a sale of the premises.

This judgment still remains unmodified and in full force. It is an adjudication as to the rights of the parties as they then existed and as such is binding upon them. As to the right of the plaintiff to the deficiency judgment, and the facts then existing upon which such right depends, the original judgment must be regarded as *res adjudicata*.

Again. The order vacating the deficiency judgment was based upon an alleged oral stipulation made by Rasquin, the managing clerk of the plaintiff's attorney. Rule eleven of the general rules of practice of the Supreme Court provides that "no private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or, unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel." This rule is of somewhat ancient origin. It grew out of the frequent conflict between attorneys as to agreements made with reference to proceedings in actions, and was intended to relieve the courts from the constant determination of controverted questions of fact with reference to such proceedings. Here we have an alleged oral arrangement in reference to the proceedings in a cause made by the attorney or his clerk, which, as it appears to us, comes within the express condemnation of the rule. (*Broome v. Wellington*, 1 Sandf. 664; *Bain v. Thomas*, 2 Caines R. 95; *Leese v. Schermerhorn*, 3 How. Prac. R. 63; *M. & H. Organ Co. v. Pugsley*, 19 Hun, 282; *Rust v. Hauselt*, 8 Abb. N. C. 148.) It is thus apparent that the order appealed from, in its present form, cannot be sustained. It absolutely sets aside and vacates a deficiency judgment which, in the seven actions, amounts in round numbers to \$10,000, thus depriving the plaintiff of that amount which it has been adjudged was actually and justly due and owing to it.

The defendant may, however, if entitled thereto, be awarded in a proper proceeding appropriate relief. Such relief may doubtless be obtained by motion. He may be entitled to

relief by having the original judgment as entered modified by striking out so much thereof as adjudges that he pay any deficiency that may arise upon a sale of the premises, or he may be entitled to have a re-sale of the premises. Whilst the oral stipulation under the rule is not binding and will not be carried into effect by the court, still it will not permit a party to be misled, deceived or defrauded by means thereof, and in some instances where it has been acted upon the party making it, will not be permitted to retract and take advantage of the acts or omissions of his adversary thereby induced. (*People v. Stephens*, 52 N. Y. 306, 310.) So that, if the defendant O'Donnell, by the oral agreement, was led to believe that the plaintiff would bid the full amount of the judgment, and, relying thereon, neglected to attend the sale and look after his interests thereat, the court may, upon motion and by way of a favor to him, order a re-sale.

Whether there was an oral agreement by which O'Donnell was misled was sharply controverted before the Special Term. The question was determined upon affidavits. We do not question the power of the Special Term to so determine the facts, but we wish to suggest that where so much is involved and the conflict is so sharp, that it would be more satisfactory to have the question determined upon common-law evidence taken by the court or before a referee appointed for that purpose, where the parties could have an opportunity to cross-examine the witnesses. (*Hill v. Hermans*, 59 N. Y. 396.)

The order of the General Term and that of the Special Term should be reversed, with costs, and the proceedings remitted to the Special Term for such further action in the matter as counsel may advise.

All concur.

Ordered accordingly.

WILLIAM N. COLER et al., Respondents, v. THE PITTSBURGH  
BRIDGE COMPANY, Impleaded, etc., Appellant.

*It seems*, that under the provision of the Code of Civil Procedure in regard to the service of summons upon a foreign corporation which authorizes the service by delivery of a copy to "a managing agent" of the corporation within the state it is not necessary that the office of the person to whom the copy is delivered should be precisely described as "managing agent," but it was intended that any person holding some responsible and representative relation to the company, such as the term "managing agent" would include, might be served.

In an action against a foreign corporation a copy of the summons was delivered in this state to C., who the plaintiff claimed was a managing agent of defendant. Upon a motion to set aside the service the moving affidavits alleged that C. is not and was not at the time of the service defendant's managing agent in any sense, but was its "representative" in the city of Chicago, where he resided, and was only temporarily visiting in the city of New York, when served. The opposing affidavits were to the effect that C. was in New York at the time, upon business connected with the company; that he stated that he represented it, and that his name appeared in the Chicago city directory as "manager" of the company. *Held*, that sufficient was not shown to establish that C. was managing agent of defendant within the meaning of said provision; and so, that there was no valid service of the summons.

(Argued May 20, 1895; decided May 29, 1895.)

APPEAL from an order of the General Term of the Supreme Court, in the second judicial department, made February 18, 1895, which affirmed an order of Special Term denying a motion by defendant, the Pittsburgh Bridge Company, to set aside and to vacate as to said company the service of a summons in the above-entitled action.

The nature of the action and the facts, so far as material, are stated in the opinion.

*John C. Coleman* for appellant. Curtis was not a managing agent within the meaning of the Code. (*Taylor v. G. S. P. Assn.*, 136 N. Y. 343.) The service upon Curtis was invalid on general principles of interstate comity. (*Goldney v. M. N. Co.*, N. Y. L. J., March 25, 1895; *Morawetz on Corp.* § 523;

*Monlin v. F. Ins. Co.*, 24 N. J. Law, 222; *Pennoyer v. Neff*, 95 U. S. 721; *G. H. Co. v. R. B. F. Co.*, 22 Fed. Rep. 635.)

*Edward W. Crittenden* for respondent. If Walter N. Curtis was a managing agent of the corporation, and was served within the state, the service was sufficient. (*Porter v. S., etc., Co.*, 17 Civ. Pro. Rep. 386; *Childs v. H., etc., Co.*, 104 N. Y. 477; *Pope v. T. H., etc., Co.*, 87 id. 137; *Hiller v. B., etc., Co.*, 70 id. 223.) The object of all service of process is to give notice to the party, and any service must be deemed sufficient which renders it reasonably probable that the party has had notice. (*Palmer v. T. P. Co.*, 35 Hun, 369; 99 N. Y. 679; *Barrett v. A., etc., Co.*, 138 id. 691.)

GRAY, J. The action was brought in equity to compel the South St. Paul Belt Railroad Company, one of the defendants, to specifically perform a certain contract made in the city of New York for the sale to the plaintiff of certain bonds issued by the city of South St. Paul, to aid in the construction of a bridge across the Mississippi river for the use of said railroad. It appears, after the contract had been entered into, that the railroad company sold the bonds, or some of them, to the Pittsburgh Bridge Company, another of the defendants in the action; a corporation organized and existing under the laws of the state of Pennsylvania. The summons in the action was served on a person named Curtis, as an alleged managing agent of the bridge company, while he was in the city of New York. The bridge company moved to set aside the service of the summons, upon the ground that the said Curtis was not its agent within this state, but that he was the "representative" of the company in the city of Chicago, in the state of Illinois, which was also his residence, and that he was only temporarily visiting in the city of New York. The affidavit, read in behalf of the bridge company, also, set forth that, at the time of the service of the summons and since that time, the company had no property within the state of New York, nor an office or place of business within said state; and that



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the said Curtis is not, and was not at the time of the service, managing agent of the bridge company in any sense.

In opposition to the motion, affidavits were read on behalf of the plaintiff to the effect, that said Curtis was in the city of New York at the time upon business connected with the bonds above mentioned and had stated that he represented the bridge company and his name appeared in the city directory of the city of Chicago as "manager of the Pittsburgh Bridge Company."

We do not think that enough was shown to make out that Curtis was "a managing agent" of the foreign corporation. It is true that the bridge company admitted, or stated, that he was a "representative" of the company in the city of Chicago in the state of Illinois; but whether the capacity in which he represented and served the company was of such a nature as to impose upon him those duties and responsibilities, which would raise him to the level of "a managing agent," is too uncertain. His relation to the company, as its "representative" in the city of Chicago, may very possibly have been of a restricted nature. Nor would it do, in a case of such gravity as the maintenance of an action against a foreign corporation, to rely either upon the alleged statements of the person served, as here, or upon what he may have been described in the city directory of the city of Chicago. It is not necessary that the office of the person to whom the summons is delivered, in a suit against a foreign corporation, should be precisely described as that of "a managing agent;" because, as we think, from the language of section 432 of the Code of Civil Procedure, it was intended that any person holding some responsible and representative relation to the company, such as the term "managing agent" would include, might be served with the summons.

In the absence, therefore, of proof with respect to what the relation actually is to the foreign corporation of the person, to whom the summons is delivered in this state, it is the wiser and the better rule to adopt that the right to maintain the action has not been acquired.

Statement of case.

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For these reasons, we think that the orders below should be reversed and an order should be entered vacating and setting aside the service of the summons, with costs.

ANDREWS, Ch. J., PECKHAM and HAIGHT, JJ., concur;  
FINCH and BARTLETT, JJ., dissent.

Ordered accordingly.

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147	119
148	284
f164	20

In the Matter of the Application of OSCAR H. GOODMAN,  
Respondent, to Strike from the Registry of Voters the  
Name of HENRY W. BAINTON, Appellant.

Under the provision of the act of 1894, amending the Election Law (§ 87, chap. 275, Laws of 1894), which authorizes the cancellation of names on registry lists, a judge at Chambers has the right to strike from a registry list the name of a person not qualified as a voter in the election district, or who cannot become so qualified before the election.

*It seems*, however, the provision does not apply to a case of doubt, where there is a dispute about the facts, or ground for differing inferences, but only where the facts show affirmatively that the person is not and cannot become qualified.

Where a person residing in one election district of a city removes to, takes and occupies a room in a seminary of learning in another district, as a student, and not permanently as a residence, he neither loses his residence nor gains a new residence in the seminary district by the removal, and is lawfully entitled to vote in the former district, not the latter.

While the voter may change his legal residence into a new district in spite of the fact that he becomes a student in an institution of learning therein, presumably his occupation of rooms in the institution is only during the prescribed period of study, and so, such occupation is no evidence of a change of residence, but the facts to establish the change must be wholly independent of his presence in the new district as a student, and, *it seems*, should be clear and convincing to overcome the natural presumption.

*It seems*, also, that a verified statement of the voter of a mental intention to change his residence is not, unless fortified by consistent acts, sufficient to overcome such presumption.

(Submitted May 20, 1895; decided May 28, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 18, 1895,

which affirmed an order of Special Term striking from the list or registry of voters in the twenty-fifth election district of the twenty-first assembly district in the city of New York the name of Henry W. Bainton.

The application was made under section 37 of chapter 275 of the Laws of 1894, which provides for the addition and cancellation of names on the registry lists. The affidavit of the applicant, after stating that he was an elector of the twenty-fifth election district of the twenty-first assembly district of the city of New York, and had duly registered as a voter for the election of 1894, alleged that Henry W. Bainton had registered in said district from No. 41 East Sixty-ninth street, in said city, as a residence; that said number is a seminary of learning, known as the Union Theological Seminary, in which said Bainton is a student, and is not a resident of said district; that his name appeared in the catalogue of said theological seminary for 1893 and 1894 as a student of the junior class, his residence being given as New York city and his room 1 South Hall. The affidavit of Bainton in opposition to said motion stated that he was born in the city of New York in 1863, and had always resided in said city; that his father lived on the corner of Sixty-ninth street and Western boulevard until his death in 1890, and that since then the house has been demolished; that deponent had not resided with his father since 1883; that from 1884 to 1891 he had traveled in the West; that in 1891 he entered the junior class of Columbia College; that while there he boarded by the week in various places, and in December, 1892, roomed at No. 7 West Eighty-fourth street, remaining there until September, 1893, when he gave up his room and removed his effects to No. 41 East Sixty-ninth street, where he has since resided. Deponent further stated that he had no residence elsewhere, and that there was no other place in New York city he could claim as a residence; that he had no intention of changing his residence and came there for the purpose of obtaining a residence and domicile, being employed at a salary in mission work for the Park Presbyterian Church of said city.

*James A. Blanchard* and *Thomas F. Wentworth* for appellant. The language of section 3, article 2 of the Constitution places no restriction or limit upon a student's right to acquire a residence at any place where any other citizen not a student might acquire such residence. (*Silvey v. Lindsay*, 107 N. Y. 61; Laws of 1892, chap. 680, §§ 35, 36, 110, 111; *People v. Holden*, 28 Cal. 137; *Sanders v. Getchell*, 76 Maine, 165; *Woods v. Fitzgerald*, 3 Oreg. 568; *Darragh v. Bird*, Id. 221; *Hunt v. Richards*, 4 Kans. 216; *Putnam v. Johnson*, 10 Mass. 487; *In re Ward*, 29 Abb. [N. C.] 187; *Cerry v. Wilcox*, 62 N. W. Rep. 249.) The name of the appellant could not be stricken from the registry of voters in a summary proceeding before a judge at Chambers. (Laws of 1892, chap. 680, §§ 36, 110, 111; *People v. Pease*, 27 N. Y. 45; *People v. Stapleton*, 119 id. 175; *Goetcheus v. Matthewson*, 61 id. 420; *People v. Smith*, 10 Misc. Rep. 100; Laws of 1894, chap. 275, § 37; *In re Hamilton*, 80 Hun, 511; *People v. Bell*, 119 N. Y. 189.)

*Charles H. Knox* and *Louis H. Hahlo* for respondent. The order should be affirmed. (Laws of 1894, chap. 275, § 37; Const. N. Y. art. 2, § 3; *Silvey v. Lindsay*, 107 N. Y. 55; *People v. Cady*, 143 id. 100; *U. S. v. U. P. R. R. Co.*, 91 U. S. 72.)

FINCH, J. It is objected to this appeal that the question involved has become purely abstract, since the election has passed for which the intending voter registered, and restoring his name to the registry from which it was removed would be an idle ceremony without the least practical result. But the incident is of a recurring character, and likely to occasion a repeated denial of the asserted right, and the point in dispute is one of public interest, and requiring official action which needs some degree of direction in view of expressed differences of opinion.

It is conceded by the respondent that the intending voter was a resident of the state and of the county, and entitled to

vote at the election. What is denied is that he acquired any right to vote in the election district in which the seminary which he entered and in which he took rooms was situated. It is admitted that he could have lawfully registered from 84th street, which was his last residence prior to his removal to the seminary, but in a different election district, and would have been a qualified voter there: the precise contention being that he did not lose his residence there by removing to the seminary, nor gain a new residence in the seminary district by his presence in it as a student. I think that is a correct construction. It does not disfranchise the voter, but determines the place where he may lawfully vote. In the case of *Silvey v. Lindsay* (107 N. Y. 55) we held that the removal to the Soldiers' Home at Bath by one whose legal residence was in New York did not on the one hand give him a new voting residence at Bath, nor on the other deprive him of his old voting residence in New York. We said he could go back there and vote and was to be regarded as temporarily absent therefrom. Here the presence of Bainton in the seminary was as a student, and for the purposes of a student only, and by that removal he neither gained a new residence in the seminary district nor lost his prior one in the 84th street district. He could have registered in the latter and voted at its poll, and if challenged could have taken the oath that he was a resident of that district, as he legally remained, although having no actual abode in it. He could lose such residence, of course, but did not do so by the mere fact of taking rooms in the seminary as a student.

We do not mean to say that a voter may not change his legal residence into a new district in spite of the fact that he becomes a student in an institution of learning therein, but the facts to establish such a change must be wholly independent and outside of his presence in the new district as a student, and should be very clear and convincing to overcome the natural presumption. In the present case there were no such facts. Presumably rooms in the seminary rented to students are to be occupied only during the prescribed period of study,

and not permanently as a residence, and there was nothing before the court to show any change of residence beyond the temporary presence at the institution for such period of study. This construction obeys literally the constitutional mandate, and does not necessarily disfranchise a single citizen. It merely recognizes and applies the admitted truth, acted upon at every election, that the voting residence may be in one place and the actual abode in another. Usually, perhaps always, the voting residence remains unchanged until a new residence is actually acquired, but there can be no such acquisition merely by an abode as a student in an institution of learning. Something else, beyond that fact and wholly independent of it, must occur to effect the change. [The intention to change is not alone sufficient.] It must exist, but must concur with and be manifested by resultant acts which are independent of the presence as a student in the new locality. It is only in quite exceptional cases that such a result could be reached, and nothing in the one before us takes the situation out of the constitutional rule.

The dissenting opinion in the General Term, in another case, which has been put before us by the appellant, is in entire accord with this view except at a single point. It argues that one who is qualified as a voter by residence in the state and in the county may change his election district to one where he attends an institution of learning. I agree to that possibility, which I deem somewhat exceptional, but I am unable to say that where the new abode is occasioned and explainable by, and referable to the presence as a student, without any independent facts showing a change of residence, not only intended but accomplished wholly outside of the student character, the new residence in the new district is acquired, because it is a change of residence merely from one district to another. In such a case I think the old residence remains, and is not lost until, after the temporary sojourn as a student, a new residence is acquired. The exact difference of opinion seems to be only this, that the dissenting judge thought there were such independent facts, while in the present case, at least, we

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are unable to see any. The effort to establish any such change will usually prove to be difficult, and may easily become perilous.

A further point is made over the right of a judge at Chambers to strike names from the registry. Such right is given by the amendment of 1894 (Chap. 275, § 37), where the name of a person not qualified in the election district or who cannot become so qualified before the election appears upon the lists. This provision applies, not to a case of doubt, not to one resting in some uncertainty or dependent upon inferences of a debatable character, but to a case in which the facts show affirmatively that the intending voter is not and cannot become qualified. If there is dispute about the facts or ground for differing inferences, the judge should not intervene, but leave the voter to swear in his vote at his peril, taking upon himself the risk of his persistence. Where, however, as in this case, there is no dispute about the facts, and they admit of but one inference, the judge may order a name to be removed. Here there was no possible element of uncertainty unless it lay in the hidden mental intention of Bainton to take up a residence at the seminary independently of his presence there as a student. He is very careful not to swear to any such intention. He obviously confuses residence with place of abode, and then swears that he has no other than the seminary and intends to make that his residence. What he says is consistent with the tenor of his concurrent acts, which indicate nothing more than a purpose to abide in the seminary rooms for the temporary sojourn of a student. The legal and natural inference from his act is not even rebutted by an asserted independent and extrinsic intention. Indeed, if some such mental purpose had been averred it would hardly have raised a sufficient doubt unless fortified by consistent acts, for the secret thought, known only to the individual, can rarely come under legal investigation or be subjected to any test unless by reference to the acts which manifest it and are occasioned by it. The voter who relies wholly upon that undisclosed mental intention to outweigh obvious inferences from

who is confused here?

his act puts himself in an unsafe position. I understand the appellant to concede the validity of the act of 1894 as thus construed, and there is no just reason for a denial of its validity and operative force.

The order should be affirmed, with costs.

All concur.

Order affirmed.

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WILLIAM J. DEMPSEY, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

A person appointed to the office of railroad policeman under the "Railroad Law" (§ 58, chap. 565, Laws of 1891) is a public officer within the meaning of the constitutional provision (Art. 13, § 5) prohibiting a public officer from receiving for his own use and benefit a free pass from any corporation.

Where, however, prior to the adoption of the Constitution plaintiff entered into a contract with defendant, a railroad corporation, by which he agreed to render services for it in preventing depredations upon its property by thieves and trespassers, he to receive for his services a fixed salary and also an annual pass for transportation over its road and that of another railroad company, which could be used by him whether engaged in the business of the corporation or in his own private affairs, and to carry out his contract plaintiff procured an appointment to said office of railroad policeman, qualified as such, and entered upon the performance of his duties, *held*, that the pass to which he was entitled under the contract was not a "free pass" within the meaning of said constitutional provision; that the contract, therefore, was not in conflict with that provision; and that an action was maintainable to compel specific performance of the contract by defendant.

(Argued May 20, 1895; decided May 28, 1895.)

APPEAL from an interlocutory judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 23, 1895, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term overruling a demurrer to the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.



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*D. G. Griffin* for appellant. The plaintiff is not entitled to enforce so much of the contract as is in issue, because in so doing the parties would violate article 13, section 5 of the State Constitution. (Laws of 1890, chap. 565, § 58; *People v. Rathbone*, 145 N. Y. 434; *People v. Nostrand*, 46 id. 375; *People ex rel. v. Common Council*, 77 id. 507; *Roland v. Mayor, etc.*, 83 id. 376; *Bradford v. Justices*, 33 Ga. 332; *Olmstead v. Mayor, etc.*, 10 J. & S. 481.) The terms "free pass," "free transportation" and "discrimination in passenger rates," as used in the Constitution and prohibited thereby, are intended to include all passes, transportation and rates which are not paid for in cash or in the usual manner charged the general public. (*People v. Rathbone*, 145 N. Y. 434.)

*P. W. Cullinan* for respondent. The provision of the Constitution is directed towards those cases where persons who, being public officers, accept passes and transportation without any lawful consideration therefor. The language of the Constitution in furtherance of the purpose of prohibiting such practices is that public officers shall not receive "free" passes or "free" transportation, meaning a right to travel without cost or charge, or the payment of a consideration therefor, but it does not say that such officials cannot receive passes or transportation giving them the right to travel, if they be not "free," assuming, of course, that there be no discrimination otherwise. (Const. N. Y. art. 13, § 5.)

BARTLETT, J. This is an appeal from an interlocutory judgment of the General Term, fourth department, affirming an interlocutory judgment of the Special Term overruling a demurrer to the complaint.

The plaintiff seeks in this action to compel the defendant to issue to him for the year 1895 an annual pass upon its railroad in pursuance of a contract to that effect; also to recover damages suffered by reason of the breach of the contract.

The defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, its contention

being that the plaintiff is a public officer and that it cannot lawfully perform such contract and issue the annual pass as it would be a violation of article 13, section 5 of the Constitution of the state of New York which went into effect January 1st, 1895, and prohibits a public officer from receiving for his own use or benefit any free pass from a corporation.

The plaintiff, in March, 1893, entered into a contract with defendant wherein it was mutually agreed that the plaintiff should perform services for the defendant in preventing depredations upon its property by thieves and trespassers, and that the plaintiff in the performance of such duty should at all times be ready to respond to any demands made upon him by the defendant; that as a consideration for such services the defendant was to pay plaintiff a salary of seventy-five dollars a month and deliver to him an annual pass in the usual form for transportation over the railroad of the Rome, Watertown & Ogdensburg Railroad Company and also over the railroad of the defendant to be used by plaintiff whether engaged in the business of the defendant or in his own private affairs.

In order to carry out this contract the plaintiff, in July, 1893, secured from the governor of the state an appointment to the office of railroad policeman under the Laws of 1890, chapter 565, section 58, known as the Railroad Law.

The act requires the appointee to take and subscribe the constitutional oath of office and file it with his commission in the office of the secretary of state, and the latter certifies the fact to the county clerk of each county where the policeman is authorized to act. The act further provides that the compensation of such policeman shall be paid by the corporation for which he is appointed, and the appointment shall cease at the pleasure of the corporation.

The plaintiff at once duly qualified as such policeman and entered upon the performance of the contract, and so continued until the first day of January, 1895, up to which time both parties performed the same. On the first day of Janu-

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ary, 1895, the defendant refused, on demand, to issue its annual pass to plaintiff for the reasons already stated, and this action was commenced.

There are two questions presented by this appeal, viz.: Is the plaintiff a public officer, and does the constitutional provision referred to prevent the defendant from issuing to him its annual pass under the contract?

The plaintiff was appointed by the governor of the state of New York; was required to take the constitutional oath, and was by virtue of his appointment authorized to perform the duties of a peace officer or policeman in protecting the property of the defendant and of the general public in the custody of the defendant.

We think the manner of his appointment and the character of his duties constitute the plaintiff a public officer.

In *Henly v. The Mayor of Lyme* (5 Bing. 91) BEST, Ch. J., answering the question "what constitutes a public officer," says: "In my opinion every one who is appointed to discharge a public duty and receive a compensation in whatever shape, from the crown or otherwise, is constituted a public officer."

Chancellor SANDFORD, in case of *Wood* (2 Cowen, note at page 30), said: "The terms 'office and public trust' have no legal or technical meaning distinct from their ordinary signification. An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested." (*People ex rel. Kelly v. Common Council*, 77 N. Y. 507.)

In *Rowland v. The Mayor* (83 N. Y. 376) Judge DANFORTH, in considering this subject, says: "Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office."

Assuming, then, that the plaintiff is a public officer, does the Constitution prevent his accepting from the defendant its annual pass as a part of the consideration to be paid him for his services under the contract?

In considering this question it must be conceded that unless the contractual relations of the parties distinguish this case from that of the ordinary public officer the issue of the annual pass would be illegal. This court has very recently held, in the case of a notary public, that while it was quite obvious that he was not in that class of public officers who should be prohibited from accepting privileges or favors from corporations, yet as the language of the Constitution was plain and comprehensive the courts were bound to strictly enforce its provisions. (*The People v. Rathbone*, 145 N. Y. 434.)

What, then, are the precise provisions of the Constitution which are claimed to be violated by the strict performance of this contract which was in force for nearly three years before the Constitution went into effect?

"No public officer, or person elected or appointed to a public office under the laws of this state, shall directly or indirectly ask, demand, accept, receive, or consent to receive, for his own use or benefit \* \* \* any free pass \* \* \* from any corporation, or make use of the same for himself or in conjunction with another." (Const. art. 13, sec. 5.)

It will be observed that a public officer is forbidden to receive and use a "free pass," it being the obvious intention of the Constitution to prohibit the public officers of the state from receiving from corporations privileges or favors—in other words gifts—that might improperly influence them in the discharge of their official duties.

So, if this constitutional provision applies to the plaintiff as a public officer, it is due to the fact that he is accepting a "free pass," a gift, from the defendant. This court, more than thirty years ago, held that the holder of a pass who had compensated the corporation therefor, could not be regarded in any just sense as a gratuitous passenger. (*Smith v. N. Y. C. R. R. Co.*, 24 N. Y. 227.) In the case cited the holder of the pass was the owner of cattle traveling in charge of them under a contract, and paid no independent consideration for his own transportation; he was killed on the journey by reason of the negligence of the railroad company, and notwith-

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standing that the contract provided that "the persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause," the court held the holder of the pass was not a gratuitous passenger in any just sense.

In the case at bar we have the plaintiff, a railroad policeman, traveling over the lines of the defendant in the discharge of his responsible duties in preventing depredations upon the property of the defendant and the public by thieves and trespassers, and receiving as compensation for his services seventy-five dollars a month and an annual pass, which he was at liberty to use not only in his official, but in his private business.

This is in no sense a "free pass" within the meaning of the Constitution, but, on the contrary, is a pass for which the plaintiff has paid a full consideration, and he cannot be regarded as a gratuitous passenger.

We have not overlooked the argument advanced by the learned counsel for the appellant that such a construction will render it easy to evade this provision of the Constitution by contracts between corporations and public officers for private services by the latter, which shall be paid for in transportation.

We do not think any such danger exists as each case must be decided upon its own facts and the courts will see to it that the provisions of the Constitution are properly enforced.

The distinguishing feature in this case is that the plaintiff is a public officer whose only duty to the public is limited and defined by his contract with the defendant.

We are of opinion that this contract, which had been in force for nearly three years before the present Constitution went into effect, is a lawful one, is not in conflict with the constitutional provision under consideration and that the plaintiff is entitled to recover.

The interlocutory judgment appealed from should be affirmed, with costs.

All concur, except FINCH, J., taking no part.

Judgment affirmed.

JAMES ROARTY, Appellant, v. EDWARD C. McDERMOTT et al.,  
Defendants; FRANK J. WALGERING, Respondent.

McC. died leaving a widow and four children, who were minors, him surviving. By his will he gave to a son, the oldest child, one-fourth of all his residuary estate after payment of debts, and after deducting the widow's dower right, the same to be paid to him in cash on his becoming of age. The residue was given to the widow for life, the remainder to the three younger children. The widow was appointed executrix with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions" of the will or whenever in her judgment it might be for the best interest of the estate, "applying the proceeds to the benefit of \* \* \* said estate." The real estate was all incumbered. The widow, acting under the power of sale, sold a lot to D. for \$9,000, receiving \$6,000 in cash and D.'s bond for the balance, secured by mortgage on the premises. The money was used in paying incumbrances on the real estate. Subsequently, under an arrangement between the widow and D., the latter deeded back the lot; his mortgage thereon was cancelled and the widow executed a mortgage thereon to secure a loan made to pay the son his share, he having come of age. To secure D. the \$6,000 paid by him, the widow executed her bond and to secure it a mortgage, as executrix, on another lot, which recited the power in the will, and that the bond was executed by her, as executrix, under the power. This mortgage was foreclosed and the purchaser on foreclosure sale refused to complete the purchase, claiming the title to be defective, on the ground that the bond was not signed by the executrix in her official capacity. *Held*, untenable.

The widow, as executrix and individually, and the three infant children were made parties to the foreclosure suit, and the latter appeared by guardian. The complaint set forth the power of sale and alleged that the mortgage was executed in pursuance of the power. *Held*, that the judgment was conclusive as against all the defendants in that action; that the mortgage was executed under and pursuant to the power, and that it was a valid lien.

(Argued April 22, 1895; decided June 11, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 15, 1895, which reversed an order of Special Term requiring F. J. Walgering, the purchaser at a partition sale, to complete his purchase and denied a motion by plaintiff for an order requiring her to do so.

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Statement of case.

The nature of the action and the facts, so far as material, are stated in the opinion.

*William H. Hamilton* for appellant. The mortgage in question and the foreclosure thereof were regular and valid in all respects, and formed a sure basis of a perfect title in the purchaser at the foreclosure sale. (*Goebel v. Iffla*, 111 N. Y. 170; *Jordan v. Van Epps*, 85 id. 427; *Barnard v. Onderdonk*, 98 id. 158; *Frost v. Koon*, 30 id. 428; *Lockman v. Reilly*, 95 id. 64; *Riggs v. Pursell*, 66 id. 193; *De Forest v. Farley*, 62 id. 628; *Blakeley v. Calder*, 15 id. 617.) The order of the General Term is appealable to this court. (*Shriver v. Shriver*, 86 N. Y. 575.)

*Clemens J. Kracht* for respondent. The mortgage of \$6,000, executed by Ann McConnell as executrix of the last will and testament of Thomas McConnell, deceased, on premises in question (belonging to estate of said deceased), as further collateral security for the payment of her individual bond and mortgage, was void. (*Clarke v. Coe*, 52 Hun, 379; *Lawrence v. Townsend*, 88 N. Y. 24, 29; *Muller v. Struppman*, 55 How. Pr. 521; *Smith v. Reid*, 134 N. Y. 568; *Hetzl v. Barber*, 69 id. 1; *Allen v. De Witt*, 3 id. 276.) The rights and interest of the three infant defendants named in will of Thomas McConnell, deceased, were not cut off by the judgment of foreclosure in *Devlin v. Martin*, although made parties defendant thereto. (*Lewis v. Smith*, 9 N. Y. 502; *Frost v. Koon*, 30 id. 428, 443; *M. Bank v. Thompson*, 55 id. 7; *Rathbone v. Hooney*, 58 id. 463; *E. S. Bank v. Goldman*, 75 id. 127; *Nelson v. Brown*, 144 id. 384.) The court will protect infants' rights, even if their guardian neglects them, and where a guardian neglects to ask for such a decree as the infant is manifestly entitled to the court will, nevertheless, make such a decree. (*Stephens v. Van Buren*, 1 Paige, 479; *Litchfield v. Burwell*, 5 How. Pr. 344; *Bulkley v. Van Wyck*, 5 Paige, 536; *Leggett v. Sellon*, 3 id. 84; *Freeman v. Munns*, 15 Abb. Pr. 468.) The referee's

deed in the foreclosure suit of *Devlin v. Martin*, conveyed at most to the purchaser of the premises in question the life estate of the executrix therein. It did not convey the right, title and interest of the infant devisees in said premises. (2 R. S. 192, § 158; Code Civ. Pro. § 1632; *C. P. E. Church v. Mack*, 93 N. Y. 488; *Mygatt v. Coe*, 8 N. Y. S. R. 434; *Clements v. Griswold*, 46 Hun, 377.) The purchaser is not bound to accept title upon affidavits submitted in answer to objections to the title, appearing in the record evidence of such title. (*Jordan v. Poillon*, 77 N. Y. 521; *Oppenheimer v. Humphreys*, 125 id. 733; *Coray v. Mathewson*, 44 How. Pr. 80; *B. P. Co. v. Armstrong*, 45 N. Y. 234.) The title to premises in question is not free from reasonable doubt. A grave question of law is presented whether the infant devisees may not successfully move the court, on a proper application, to vacate the judgment in *Devlin v. Martin*, or may not successfully maintain an action of ejectment to recover possession of the premises in question. (*Jordan v. Poillon*, 77 N. Y. 521; *Cambrelling v. Purton*, 125 id. 615.)

O'BRIEN, J. This was an action to partition certain real property in the city of New York. The final judgment was executed by a sale of the property, under the direction of a referee, and Frank J. Walgering became the purchaser of a house and lot, No. 441 West Forty-fifth street, for \$15,800, he being the highest bidder at the sale.

Subsequently he refused to complete the purchase on the ground that the title tendered was not a marketable one. His objections to the title were overruled by the court at Special Term, and he was required to pay the balance of the purchase money upon tender of the referee's deed. This order, however, was reversed by the General Term. The plaintiff having appealed to this court, the question to be determined is whether, upon the facts appearing, there is such a reasonable doubt concerning the marketable character of the title tendered as to warrant the court below in discharging the purchaser from his contract obligations.



It is conceded that Thomas McConnell, who died August 24, 1871, leaving a will, was seized of the premises in fee. His widow and executrix mortgaged the house and lot to Charles Devlin on the 21st of June, 1873. This mortgage was foreclosed by decree entered in the Supreme Court May 24, 1877, and a sale had thereunder, which is the basis of the title which was tendered. If the sale upon this judgment bound the three infant children of Thomas McConnell, then unquestionably the title tendered is good, and the purchaser is bound to perform his contract.

In order to appreciate the question, it is necessary to get a clear view of the facts connected with the execution and foreclosure of this mortgage. By his will McConnell gave to his wife, after paying debts, all his real and personal estate during her natural life. This provision was, however, subject to an absolute gift to his eldest son of one-fourth of the estate, after deducting what the widow would be entitled to by way of dower, this one-fourth to be paid to him in cash on arriving at the age of twenty-one years. The remainder of the estate was given to the three younger children, after the death of the mother, and in such proportions as she might by will direct. His widow, Ann McConnell, was appointed executrix with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions of my will, or whenever, in her judgment, it may be for the best interest of my estate, applying the proceeds thereof to the benefit of my said estate." The will was proved and letters testamentary issued to the widow September 14, 1871. The real estate left under this will was all incumbered and in danger of being wasted or sacrificed unless means could be provided to pay obligations due or about to become due. On the 13th of June, 1872, the widow, acting under the power of sale in the will, conveyed, as executrix, to Charles Devlin, for the consideration of \$9,000, a house and lot on Twenty-ninth street. She received from him \$6,000 in cash, and the balance of \$3,000 in a bond and mortgage executed to her as executrix. The \$6,000 thus received was applied by her to paying off

incumbrances on the estate, and thus far there cannot be the slightest question as to her power or as to the regularity of her proceedings.

About a year afterwards the eldest son became of age, and he having demanded the share of the estate left him by the will, it became necessary to raise more money. The widow arranged with Devlin to take back the Twenty-ninth street house, and to cancel his bond and mortgage in order to enable her to give a first mortgage thereon for \$5,000, to raise that sum to pay to the son in discharge of his interest in the estate. Devlin, who seems to have been a friend of the family, assented to this, and deeded the house to the widow, and had his bond and mortgage canceled, and she subsequently raised the money on it by first mortgage, to pay off the son's claim, and took from him a release of all his interest in the estate. But, though Devlin had re-conveyed the title, he had not yet been paid the \$6,000 which he had advanced to the widow a year before, and which she had used for the benefit of the estate. That was not paid to him, but he elected to treat it as a loan to the executrix, and to secure its payment she gave to him a bond for that amount secured by a second mortgage on the Twenty-ninth street house and another second mortgage on the Forty-fifth street house in question. It is this last mortgage that we are now concerned with. That was executed to Devlin by the widow as executrix, and it recited the power in the will, and that the bond which accompanied it was executed by her as executrix, under the same power. It is now said that this mortgage was void, though executed by the widow as executrix, and this proposition is based upon the sole ground that the bond was not signed by her in her official capacity, and from this omission it is argued that the mortgage on the Forty-fifth street house was given to secure the widow's personal bond or personal debt.

This position is sought to be re-enforced by the circumstance that the re-conveyance by Devlin, of the Twenty-ninth street house, was to the widow individually, and that the title vested in her. This assumption, even if material, is not war-

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ranted by the facts. The widow could convey none of the real estate devised by her husband except through the exercise of the power in his will, and she could not convey to herself, since she could not be both seller and purchaser, and she could not accomplish indirectly what she could not do directly. Therefore, she could not and did not acquire title to any of the land for her personal benefit, by conveying to Devlin under the power, and then taking a deed from him. Whatever form the transaction took, she must be deemed to have acted officially, and the property was in her hands for the benefit of the estate if the personal representative so elected to treat it.

There can be no doubt that the deed to Devlin was a good exercise of the power, and if the parties subsequently desired to change an absolute conveyance into a mortgage, it was competent for them to do so. All that was necessary was to cancel the bond and mortgage given by Devlin for the \$3,000, and to stipulate in writing that the deed should stand as security for the \$6,000 which he had advanced. But the necessities of the widow and the estate which she represented, were such that she required a more substantial advantage, and that was the postponement of Devlin's claim to another lien which she desired to put upon the premises, and hence the conveyance to her. All this was but a method of changing a deed to a mortgage and raising more money on the land. It thus became incumbered for all that it was worth, as subsequently shown by the foreclosure sale, so, in any view, the widow could derive no personal benefit from the conveyance to her of the Twenty-ninth street house. But, after all, the question whether the widow did or did not get the title to this house in her individual capacity is not very material. The real question is, whether the mortgage which she gave, as executrix, on the Forty-fifth street house, was given to secure her own debt, or for the benefit of the estate, under the power in the will. The fact that she omitted to add her official title to her signature to the bond is of no consequence. She might have omitted to give any bond, but the incon-

testable fact remains that it was given to secure the money which Devlin had advanced to her, a year before, every dollar of which she had used in paying off incumbrances upon the rest of the real estate. Thus the case stands upon the proofs appearing on this motion, and they are not contradicted.

It remains only to inquire whether any of these facts, having any material bearing on the question of title, were left open to contest by the judgment which Devlin subsequently obtained in the action to foreclose his mortgage.

No one claims that there is any defect in that judgment except the present purchaser. He does not suggest any possible claim or right existing in behalf of any one, except the three infant children, the residuary devisees of Thomas McConnell. Whether these children, or any of them, or any of their descendants, are still alive, does not appear, as the only affidavit in opposition to this motion was made by the attorney for the purchaser, stating what he claims to be defects in the judgment as it appears of record. The widow, as executrix and individually, was made a defendant in the foreclosure suit. So were the three children, who were represented by guardian, and interposed the usual answer, putting in issue the facts stated in the complaint. The referee reported that all the facts stated in the complaint were established, and the judgment which followed in terms adjudges that the defendants and all persons claiming through or under them be forever barred and foreclosed from all right or claim in or to the premises or any part thereof.

It is plain, therefore, that if the complaint was broad enough in its scope to embrace the facts stated, that they must be deemed to be determined by the judgment, and not open to further contest.

It alleges that Ann McConnell, the widow, gave her bond to Devlin for \$6,000, to secure the payment of that sum, with interest, at the times stated. That default had been made in the payment of the principal, which became due June 21, 1876, less fifty dollars paid thereon. It also alleges the execution and delivery by the widow, as executrix, to Devlin, of a

mortgage on the Forty-fifth street house, to secure the payment of the bond, and in connection with this allegation, the following facts are stated: (1) That the house so mortgaged was part of the real estate of which McConnell died seized; (2) that he died August 24, 1871, leaving a will which was duly proved; that letters had been granted to the widow, and that the will contained the power to sell or mortgage; (3) that the mortgage was executed in pursuance of that power and authority; (4) that the three infant children of the deceased, giving their names, have or claim to have some interest in the premises, which, however, was subsequent to the mortgage and subordinate to it.

The statement that the mortgage was executed under and in pursuance of the power was, in substance and legal effect, equivalent to an allegation that it was given to secure a debt for the benefit of the estate, or to raise money for that purpose. If it was given to secure the personal debt of Ann McConnell, it was not given under or in pursuance of the power, but contrary to its terms and manifest purpose. It was, therefore, open to the children, under these pleadings, to show, if they could, what this purchaser now urges, that the mortgage was given to secure the personal debt of the widow, and hence the judgment must be deemed to have conclusively determined as against all the defendants in the action, or their privies, that the mortgage was executed under and pursuant to the power, and was a valid lien upon the Forty-fifth street house. It is not now open to any of the children, or any one claiming under them, to assert what is obviously untrue, in fact, that the mortgage was given to secure the personal debt of the executrix. That question was involved in the issues in the foreclosure suit, and has been forever set at rest by the judgment.

The order of the General Term should be reversed, and that of the Special Term affirmed, with costs.

All concur, except GRAY, J., not voting.

Ordered accordingly.

146	304
152	488
152	452
152	495

146	304
161	208
161	204
161	206
161	210

146	304
s165	310
s179	279
s179	287

146	304
78 AD	316

THE PEOPLE ex rel. THE MANHATTAN RAILWAY COMPANY,  
Appellant and Respondent, v. EDWARD P. BARKER et al.,  
Commissioners, etc., Appellants and Respondents.

Under the provision of the act of 1857, in relation to the assessment of taxes on corporations liable to taxation (Chap. 456, Laws of 1857), which prescribes the method of assessing the capital stock of such a corporation, the actual value of its capital stock, not the market value of its share stock, is to be considered; that is, the assessment is to be limited to the tangible personal property and may not include the franchises of the corporation.

Under the provisions of the Revised Statutes in reference to the assessment for taxation of real property (1 R. S. 393, § 17), which requires the assessors to assess the same at its "just and full value as they would appraise the same in payment of a just debt due from a solvent debtor," and also under the provision of the New York Consolidation Act (§ 814, chap. 410, Laws of 1882), which requires the assessment to be "at the sum for which such property under ordinary circumstances would sell," it is the duty of the assessors to assess the property at its actual value.

As the commissioners of taxes and assessments in the city of New York are sworn officers, in the absence of evidence to the contrary, it is to be presumed that they have performed their duty in making such an assessment.

It is not to be presumed that the indebtedness of a corporation represents property to the amount of such indebtedness in addition to that represented by its capital stock.

In making an assessment under said act of 1857 the earnings of the corporation may be considered by the assessors.

Where, therefore, it appeared that the earnings of the corporation enabled it to pay its running expenses, necessary repairs and interest on its indebtedness, and to declare a dividend of six per cent and still have a surplus, *held*, it was proper to assume that its capital stock remains unimpaired, and that there are surplus assets sufficient to pay its outstanding indebtedness.

In assessing personal property assessors are entitled to exercise more latitude than is permitted in assessing real property.

The admissions of parties, oral or written, not given in evidence on the trial, may not be received by an appellate court for the purpose of reversing the findings of the trial court.

(Argued May 20, 1895; decided June 11, 1895.)

CROSS-APPEALS from order of the General Term of the Supreme Court in the first judicial department, made April

N. Y. Rep.]

Statement of case.

11, 1895, which reversed an order of Special Term vacating and setting aside an assessment of the relator's capital stock for taxation as personal property for the year 1894, and affirmed the proceedings of the commissioners of taxes and assessments.

The facts, so far as material, are stated in the opinion.

*Julien T. Davies, John F. Dillon and Herbert Barry* for relator, appellant and respondent. The relator furnished to the commissioners all the evidence required by the statute, and all required by the commissioners themselves. (1 R. S. [8th ed.] 414, § 2.) The commissioners are not free capriciously to disregard any part of the evidence. They must base their assessments upon evidence, not mere presumptions. (*People ex rel. v. Coleman*, 126 N. Y. 433; *People ex rel. v. Barker*, 139 id. 55; *People ex rel. v. Barker*, 141 id. 251; *People ex rel. v. Dykes*, 45 N. Y. St. Repr. 621; *People ex rel. v. Barker*, 144 N. Y. 94.) The contention of the commissioners is, in brief, as follows: The relator acquiesced in an assessment in 1893; therefore, it admitted that the assessment was just. But if it admitted that the assessment was just, then it admitted that it then had taxable personal assets equal to the amount of the assessment. And it follows that in 1894 the relator had \$5,000,000 more assessable personal property than in 1893. And if the relator submitted in 1893, then it is estopped from ever after asserting its rights. This is untenable. (*Slingerland v. Norton*, 58 Hun, 578; *White v. O. D. S. S. Co.*, 102 N. Y. 660; *Smith v. Satterlee*, 130 id. 677; *Tennant v. Dudley*, 144 id. 504; *Allen v. McKeen*, 1 Sumn. 276.) The statement of surplus earnings in the report of the company to the commissioners was consistent with the relator's other statements; it did not justify the commissioners in disregarding those other statements. (*People ex rel. v. Barker*, 144 N. Y. 638.) The duty of the commissioners was to interrogate the relator, to obtain all evidence required, and they are bound by the evidence actually given. (*People ex rel. v. Barker*, 141 N. Y. 251; 139 id. 55.) The relator is not liable to taxation for local purposes upon its franchises, and no assessment should be based upon the value of those

franchises. (*M. S. Bank v. City of Rochester*, 37 N. Y. 365; *People ex rel. v. Coleman*, 126 id. 433; *People v. H. Ins. Co.*, 92 id. 329; *C. T. Co. v. N. Y. C. & N. R. R. Co.*, 110 id. 250, 254; *Bank of Commerce v. City of New York*, 2 Black, 620; *People v. H. Ins. Co.*, 134 U. S. 594, 599; Laws of 1857, chap. 456; Laws of 1886, chap. 761, § 7; Laws of 1867, chap. 861; Laws of 1880, chap. 542; Laws of 1881, chap. 361, §§ 3, 6; Laws of 1882, chap. 409, § 321; Laws of 1886, chap. 679; Laws of 1887, chap. 479; *M. S. Bank v. City of Rochester*, 37 N. Y. 365; *H. Ins. Co. v. State*, 134 U. S. 504; *C. T. Co. v. N. Y. C. & N. R. R. Co.*, 110 N. Y. 250.) The commissioners erred in disregarding the debts of the relator. (*People ex rel. v. Barker*, 72 Hun, 126; 141 N. Y. 196; *People ex rel. v. Barker*, 139 id. 55; *People ex rel. v. Barker*, 76 Hun, 454.) The provision in the order relating to payment of tax without penalty or interest is equitable and just and within the power of the court. (Code Civ. Pro. § 1323; *People ex rel. v. Livingston*, 80 N. Y. 96; *Wallace v. Berdell*, 105 id. 7; *P. N. Bank v. Bayne*, 140 id. 321; *Haebler v. Myers*, 132 id. 363; *Chamberlain v. Choles*, 35 id. 477; *McGuckin v. Coulter*, 1 J. & S. 328; Laws of 1882, chap. 410, §§ 821, 822, 861.) The interest in this case being a penalty, the statute imposing it should be strictly construed. (*Cutler v. Mayor, etc.*, 92 N. Y. 166.)

*David J. Dean* for respondents. The mode of assessment pointed out by the statute has been strictly followed by the commissioners, and no error in their proceedings is shown by the return. (1 R. S. [8th ed.] chap. 13, tit. 4; *People ex rel. v. Comrs. of Taxes*, 95 N. Y. 561; *People ex rel. v. Coleman*, 126 id. 433; Laws of 1882, chap. 410, § 814; *People ex rel. v. Barker*, 144 N. Y. 94; 66 Hun, 27.) The commissioners of taxes had power to go beyond the statement, and, upon their own judgment or knowledge, determine the value of the relator's assets at a figure in excess of the amount stated by the relator. (*M. F. Ins. Co. v. Comrs. of Taxes*, 76 N. Y. 64; *People ex rel. v. Barker*, 48 id. 77; *People*



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N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

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*ex rel. v. Davenport*, 91 id. 574; *People v. Asten*, 100 id. 597; *People ex rel. v. Barker*, 144 N. Y. 94.) Surplus is composed of assets, realized from profits remaining undivided and subject to division at the option of the directors, and being additional to the assets which constitute the unimpaired capital. (*U. T. Co. v. Coleman*, 126 N. Y. 437.) The commissioners of taxes have not contravened anything decided in the cases of *People ex rel. v. Barker* (139 N. Y. 55); *People ex rel. v. Barker* (141 id. 196); *People ex rel. v. Barker* (Id. 251); *People ex rel. v. Coleman* (126 id. 433); *People ex rel. v. Barker* (95 id. 561). The deduction of the assessed value of the realty from the value of the assets of the company in excess of its debts is the deduction which the statute requires to be made in fixing the assessment for capital. (*People ex rel. v. Asten*, 100 N. Y. 601.) It is the intention of the statute that all the property of the corporation shall be assessed to its aggregate actual value, and that so much thereof as would otherwise escape taxation, by reason of undervaluation of realty, shall be assessed as capital under head of personalty. (*People ex rel. v. Tax Comrs.*, 95 N. Y. 556; *People ex rel. v. Comrs. of Taxes*, 104 id. 249; *People ex rel. v. Barker*, 144 id. 94.) The result arrived at in the case at bar is clearly just and should be sustained. (*P. R. R. Co. Case*, 104 N. Y. 249; *People ex rel. v. Barker*, 144 id. 94.)

HAIGHT, J. On the 8th day of January, 1894, the commissioners of taxes and assessments of the city of New York assessed the relator, the Manhattan Railway Company, for its personal property at the sum of \$30,000,000. In the month of April thereafter the relator filed a statement upon one of the blank forms furnished by the department of taxes and assessments showing its condition on the second Monday of January, 1894. An examination of the treasurer of the company was thereupon had by the commissioners, who then reduced the assessment and fixed it at the sum of \$17,860,712. The relator thereupon procured a writ of certiorari directed to the tax commissioners, commanding them to make return

of the proceedings had before them to the Special Term of the Supreme Court in order that a review might be had before that court. Upon the returns so made by the commissioners a hearing was had by the court in November, 1894, upon which an order was entered vacating the assessment. Upon an appeal to the General Term this order was reversed and the assessment as made reinstated. The statement furnished by the relator to the commissioners of taxes and assessments is substantially as follows :

Total gross assets.....	\$11,071,315
Capital stock actually paid in or secured to be paid in.....	29,925,200
Amount of surplus earnings.....	<u>5,326,432</u>

Rate of dividend for last year or last annual dividend, 6%.

Indebtedness in detail as follows :

Mortgage bonds outstanding, Manhattan Rail- way Co.....	\$11,663,035
Mortgage bonds outstanding, N. Y. El. R. R. Co.....	8,500,000
Debenture bonds outstanding N. Y. El. R. R. Co .....	<u>\$1,000,000</u>

Total ..... \$21,163,035

Assessed value of real estate, N. Y. Co. structure .....	\$4,128,000
Structure, formerly Suburban structure.....	1,101,700
In fee, as per statement.....	1,946,000
Leasehold, as per statement.....	62,000
In fee, Suburban.....	<u>85,500</u>

Total ..... \$7,323,200

Rolling stock.....	\$1,983,739
Supplies, tools, &c. ....	381,538
Cash.....	<u>1,382,838</u>

Total ..... \$3,748,115

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Amount invested in the capital stock of the Metropolitan Elevated Railroad Co. which is taxed upon its capital.....	\$7,075,200
Amount invested in U. S. securities, 10% of capital (\$29,925,200).....	<u>2,992,520</u>

It also appears from the statement that the mortgage and debenture bonds of the N. Y. El. R. R. Co. are direct obligations of the Manhattan Company by reason of the merger of the N. Y. El. R. R. Co. into the Manhattan Co., and that no portion of the indebtedness mentioned was incurred in the purchase of non-taxable property or securities for the purpose of evading taxation. In the testimony given by the treasurer of the Manhattan Co. before the commissioners it is stated that "The present authorized capital stock of the Manhattan Railroad Company is \$30,000,000, and that \$29,925,200 has been issued; of that amount \$7,800,000 has been issued to the shareholders of the New York Co. merging that company with the Manhattan. At present and since the second Monday of January, 1894, the merger of the Metropolitan Company has been completed and \$7,150,000 of the capital of \$30,000,000 has been issued to the Metropolitan Company. When this return was made a few shares of the Metropolitan were outstanding not exchanged, and for that reason the return was made somewhat short of \$30,000,000 as the actual capital stock. The capital stock of the Manhattan Co. to the extent of \$4,000,000 has been issued to take in the Suburban Co. and was used in connection with the merger of that company. The original capital stock of the Manhattan was \$13,000,000. When this capital was increased to \$30,000,000 for the purpose of completing the merger of the New York and Metropolitan Companies with the Manhattan the agreement of the merger provided that capital stock of the Manhattan should be issued to the holders of this \$13,000,000 of stock at 85% or that capital stock in par value of \$11,050,000 has been issued to the old stockholders of the Manhattan Co. who held the original

\$13,000,000. That \$13,000,000 was originally issued in connection with the leasing to the Manhattan of the N. Y. and Metropolitan Companies and the stockholders of those two companies respectively received \$6,500,000 of the capital stock of the Manhattan Co. as the consideration for the making of these leases." It further appears from his testimony that the \$5,326,432 entered in the statement as the amount of surplus earnings was the amount of the earnings of the company over and above the dividends. That such surplus appeared upon the books of the company, but was not in fact now existing for the reason that it had been expended and was now represented by the real and personal property inclosed in the statement, with the exception of the \$1,382,838 cash on hand. The commissioners in their return state that the method by which they made their assessment was as follows: "At the time that we fixed the assessment against the relator at the sum of \$17,860,712 we had before us and considered the statement filed with us by the above-named relator upon its application for a reduction and cancellation of an assessment against it for the year 1893, and we were further advised and informed by the records in our office touching the proceedings had upon the application by this relator for a reduction and cancellation of an assessment against it for the year 1893 that the relator had then admitted its liability to and assented to an assessment against its personal property in the sum of \$12,529,915, and having compared the statement of the relator filed in 1893 with the statement filed by the relator upon its application for a reduction and cancellation of the assessment against it for the year 1894, we concluded that the assessment against it for the year 1894 in the sum of \$17,860,712 would be in all respects just and fair; that accordingly we fixed the assessment for the year 1894 at that figure."

In 1893 some controversy arose over the amount of the assessment of the relator's personal property, which resulted in Mr. Davies, the attorney for the relator, addressing a letter to the commissioners, in which he states that Mr. Gould had

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authorized him to say that if the assessment did not exceed \$12,500,000 they would acquiesce. The statement made in 1892 has some slight variations from that made in 1894, but is substantially the same with the exception that the amount of surplus reported in 1894 is nearly \$1,000,000 in excess of that of 1893, so that if the commissioners in fixing the amount of the assessment for 1894 acted upon the statement made in 1893 as compared with that made in 1894, and the letter addressed to them by Mr. Davies, they could not well have increased the assessment in 1894 more than \$1,000,000 or thereabouts, the amount of the increase of the surplus earnings of the company. This would have made in round numbers \$13,500,000. It was, however, stated upon the argument by their counsel that a very different method was adopted in reaching the amount of the assessment; that in the statement furnished to the commissioners the *assessed value* of the real estate had been given at \$7,323,200, and no mention had been made as to its actual value, and that the commissioners were, therefore, left to judge for themselves as to the actual value, and that that was arrived at in the following manner:

Capital stock.....	\$29,925,200
Bonded indebtedness.....	21,163,035
Surplus .....	5,326,432
Gross assets.....	\$56,414,667

## Deductions:

Assessed value of real estate.....	\$7,323,200
Stock in other companies.....	7,075,200
Mortgage indebtedness.....	21,163,035
10% of the capital stock.....	2,992,520
Total.....	\$38,553,955
	38,553,955

which, deducted from gross assets, leaves amount assessable . . . . . \$17,860,712

The actual value of the real estate as assessed is thus ascertained from the relator's statement by deducting from the gross assets..... \$56,414,667

The amount of its personal property, consisting of rolling stock, cash, tools, etc.....	\$3,748,315
Stock in other companies.....	7,075,200
	<hr/> \$10,823,315

leaving as the actual value of the real estate.... \$45,591,352

We cannot adopt or approve of this method of ascertaining the value of the relator's personal property or of the actual value of its real estate. The method is erroneous and incorrect for various reasons. Under the statute the capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall have been exempted by law, together with its surplus profits or reserve funds exceeding ten per cent of its capital after deducting the assessed value of its real estate and of shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its *actual value* and taxed in the same manner as other personal and real estate of the county. (Laws of 1857, chap. 456, § 3.) It is the actual value of its capital stock and not the market value of its share stock that is to be assessed; in other words, it is its actual tangible personal property and not its franchises. Other statutes provide for the taxing of its real estate and franchises. (*People ex rel. The Union Trust Co. v. Coleman*, 126 N. Y. 433.) The real property of the relator is located in the city of New York under the eye and subject to the inspection of the commissioners. Under the Revised Statutes they are required to assess it at its just and full value as they would appraise the same in payment of a just debt due from a solvent debtor. (1 R. S. 393, § 17.) And under the Consolidation Act for the city of New York it shall be assessed "at the sum for which such property under ordinary circumstances would sell." The value of property is determined by what it can be bought and sold for, and there can be no doubt but that these various expressions used in the statutes all are intended to mean the

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*actual value* of the property. The commissioners are sworn officers, and as such, in absence of evidence to the contrary, are presumed to have done their duty. They have assessed the real estate at \$7,323,200, and yet, under the method presented by their counsel for ascertaining the value of the relator's personal property, they now estimate the actual value of the real estate to be \$45,591,352. We are aware that it is generally understood that in many localities throughout the state assessors, in violation of their duties, assess the real estate in their localities at a sum less than its actual value, but in the absence of evidence that this has been done by the commissioners of taxes and assessments in the city of New York, we cannot assume that they have so transgressed for the purpose of approving of their work in this case. Real property cannot well be covered up or hid from view. Its value can readily be ascertained. It should be assessed upon estimates directly made as to its value and not upon presumptions figured upon intricate theories.

Again, the method presented by respondents' counsel involves the presumption that the indebtedness of the corporation represents property to the amount of such indebtedness in addition to that represented by its capital stock. This presumption cannot be indulged. The indebtedness may have been incurred for operating expenses, wages of employees and material used up. It may represent property worn out, decayed or burned up during the existence of the corporation. Presumptions that arise from the earnings of a corporation and those that arise from its indebtedness are quite different. Too many of the railroads of the country are in the hands of receivers to warrant a judicial presumption that the bonded or other indebtedness of each road represents its actual tangible property in addition to that represented by its capital stock.

And again, the method proposed necessarily includes the value of the franchises possessed by the corporation which, as we have seen, cannot properly be included in the assessment under review.

Whilst the assessment made cannot be sustained, we think

that the relator ought not to escape a proper assessment for its property. It is true that the commissioners are not free to capriciously disregard the evidence and emancipate themselves from all restrictions and rules, however fundamental ; they are not bound by statements that are contradicted and which they disbelieve, where good reasons exist for such disbelief. (*The People ex rel. Union Trust Co. v. Coleman*, *supra* ; *The People ex rel. Edison El. Co. v. Barker*, 139 N. Y. 55-67 ; *The People ex rel. Gen. El. Co. v. Barker*, 141 id. 251 ; *The People ex rel. Manh. F. Ins. Co. v. The Comrs. of Taxes*, 76 id. 64 ; *People ex rel. Westchester F. Ins. Co. v. Davenport*, 91 id. 574.) The letter of Mr. Davies in 1893 to the effect that if the assessment was made at \$12,500,000 the company would acquiesce, having been written for the purpose of a settlement, and an adjustment of the controversy then existing, could not properly be adopted by the commissioners as the basis of an assessment for subsequent years. Still, at the same time, it might well create a suspicion as to the truthfulness of a statement made the year following, showing that so far as the property of the corporation was concerned, aside from its franchises, it was insolvent to the extent of \$3,000,000. Aside from this, there exists the fact that the net earnings of the corporation for the year were such as to enable it to pay the interest upon its indebtedness and a dividend upon its thirty millions of capital stock of six per cent and still have a surplus bordering upon a million dollars. These facts fully justified the commissioners in discrediting the statement made to them by the relator. Personal property, unlike real property, may not always be readily found and assessments thereof by assessors are often attended with many difficulties. For these reasons more latitude necessarily should be given assessors in ascertaining and determining the amount and value of personal property than should be permitted in assessing real property. Presumptions to some extent should be indulged. For this reason the earnings of a corporation may be considered by the assessors, and where they are such as to enable the company to pay its running expenses, necessary repairs, interest upon its indebtedness and



declare a dividend of six per cent and still have a surplus, it may be assumed that its capital stock remains unimpaired and that there are assets over and above sufficient to pay its outstanding indebtedness. (*People ex rel. The Equitable Gas Light Co. v. Barker*, 144 N. Y. 94.) This method, however, may include the value of the franchises, which should be deducted in order to determine the amount of property liable for assessment. Such value has not been given, and we are consequently left without the evidence at hand upon which to determine the actual value of the personal property under the presumptions arising from the facts mentioned. It may turn out that the capital stock represents property to the amount thereof in addition to the franchises; that the stock issued to the stockholders of the New York, Metropolitan and Suburban companies represented money actually paid by the stockholders of those companies for real estate and the building, construction and equipments of the elevated railroads thereon. Should such be the case, the presumption from the earnings of the company would be permissible, that the capital stock remained unimpaired, representing property over and above the franchises, to the amount thereof, and in addition, sufficient to pay the outstanding indebtedness. Upon this basis the assessable personal property could be determined by adding to the capital stock issued the surplus still on hand not invested in the real and personal property of the company and deducting therefrom the assessable value of the real estate, the stock in other companies and the ten per cent allowed by statute. The result would be as follows:

Capital stock.....	\$29, 925, 200	
Surplus on hand in cash.....	1, 382, 838	
Total .....		\$31, 308, 038
Real estate.....	\$7, 323, 200	
Stock in other companies.....	7, 075, 200	
10% of capital.....	2, 992, 520	
		17, 390, 920
Amount assessable.....		<u><u>\$13, 917, 118</u></u>

Upon the argument the respondents' counsel offered to read in evidence the report of the officers of the Manhattan Co. to the railroad commission in 1894. This report would doubtless be competent evidence for the commissioners or the Special Term to receive and act upon. It might be treated as admissions made by the relator. The General Terms sometimes receive record evidence in aid of judgments under review, but we are aware of no case in which admissions of parties, either oral or written, have been received by a court on review for the purpose of reversing the findings of the trial court. Such practice would manifestly be unjust. It would deprive the party making the statement of all opportunity to explain, modify or correct the statement. We consequently are of the opinion that we ought not at this time to consider the report or to treat it as properly before us.

The General Term was of the opinion that this assessment could be sustained upon the authority of *The People ex rel. The Equitable Gas Light Co. v. Barker* (144 N. Y. 94). The difficulty is that in that case the value of the patents and franchises was found to be \$500,000, whilst in this case we have no value given of the franchises or facts appearing from which such value can be determined.

The statute provides that upon the return of a writ of certiorari to review an assessment the court shall have power to order the assessment, if illegal, to be stricken from the roll, or, if erroneous or unequal, to order a re-assessment of the property, etc. (Laws of 1880, ch. 269, § 4.) The assessment in this case is not illegal; it is merely erroneous. A re-assessment should, therefore, be ordered.

The order of the General Term should be reversed and that of the Special Term modified so as to vacate the assessment made and order a re-assessment by the commissioners, without costs of this appeal to either party.

All concur, except O'BRIEN, J., not voting.

Ordered accordingly.

EDITH M. LAMB et al., by Guardian ad Litem, Appellants, v.  
JESSIE M. LAMB, Respondent.

L. died in 1885, leaving defendant, his widow, and plaintiffs, his three children, who were all under the age of fourteen, him surviving. After such death the widow and children continued to live in the dwelling house of the deceased, she taking care of the children and acting toward them as natural guardian. W. was appointed their general guardian upon the petition of defendant; this stated that the infants resided in the house and that no rent arose therefrom. In 1891 W. procured himself to be appointed guardian *ad litem* for the children, and as such brought this action to recover for the use and occupation of the dwelling house. It appeared that soon after the appointment of W. as general guardian he agreed to allow defendant \$1,000 a year for the maintenance and clothing of the children. No agreement was made for the payment of rent by defendant, and no demand was made therefor until a few days before the commencement of the action, and up to that time W. not only acquiesced in defendant's residence in said house, but consented to and advised it, and defendant's evidence showed and the jury found that it was expressly agreed that no rent was to be charged. *Held*, that the action was not maintainable.

*It seems*, that so far as the complaint should be held to be one under the statute (1 R. S. 748, § 2) to recover rent for the use and occupation the action could not be maintained without proof of an agreement, express or implied, to pay rent.

The testimony of defendant and W. was conflicting as to the agreement between them. Defendant was permitted to prove, under objection and exception, that just prior to the time when W. made the demand for rent he had a quarrel with defendant in which he made threats against her. *Held*, no error; that the testimony was admissible as showing the feeling of W. against defendant and so as affecting his credibility as a witness.

Reported below, 76 Hun, 186.

(Argued May 22, 1895; decided June 11, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 13, 1894, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought by plaintiff, as guardian *ad litem* of the infant children of James Lamb, deceased, to recover

for the use and occupation of certain real estate belonging to said infants.

The facts, so far as material, are stated in the opinion.

*E. Countryman* and *J. F. Crawford* for appellants. The court erred in ruling that the action would not lie to recover the value of the use and occupation in the absence of an agreement, express or implied, between the guardian and the defendant to pay therefor. (*Allen v. Sayer*, 2 Vern. 368, 369; *Bennett v. Whitehead*, 2 P. Wms. 644; *Dormer v. Fortescue*, 3 Atk. 124, 128, 129; *Hicks v. Sallitt*, De G., M. & G. 782; *Boylon v. Deinzer*, 45 N. J. Eq. 485; *Drury v. Connor*, 1 H. & Gill, 220, 230; *Van Epps v. Van Deusen*, 4 Paige, 64, 71; *Evans v. Pearce*, 15 Gratt. 513; *Martin v. Fielder*, 82 Va. 455, 458, 459; *Davis v. Harkness*, 6 Ill. 173, 181, 182; *Doe v. Kien*, 7 D. & E. 382; *Quinton v. Frith*, 2 Ir. Eq. 396; *Morgan v. Morgan*, 1 Vern. 489; *Pennington v. Fowler*, 7 N. J. Eq. 343; *Alston v. Alston*, 34 Ala. 15; *Espey v. Lake*, 15 Eng. L. & Eq. 579; *Boylon v. Boylon*, 45 N. J. Eq. 485, 493; *Heath v. Waters*, 40 Mich. 473; *Schouler's Dom. Rel.* § 326; *Peale v. Thurmond*, 77 Va. 753; *Bloomfield v. Eyre*, 8 Beav. 250; *Pascoe v. Swan*, 27 id. 508; *Waters v. Clark*, 22 How. Pr. 104; *Morris v. Niles*, 12 Abb. 103; *Ten Eyck v. Hotaling*, 12 How. Pr. 523; *Lounsbury v. Purdy*, 18 N. Y. 515, 521; *Reeder v. Sayre*, 70 id. 181, 190; *N. Co. v. S. Co.*, 72 Hun, 158; *Rochester v. Pierce*, 1 Camp. 467; *Hull v. Vaughan*, 6 Price, 157; *Newport v. Saunders*, 3 B. & A. 411; *Hellier v. Silcox*, 98 L. J. [Q. B.] 295; *Smith v. Eldridge*, 15 C. B. 236; *Gibson v. Kirk*, 1 Q. B. [1 Ad. & El.] [N. S.] 850, 855; *Beverley Case*, 6 Ad. & El. 839; *Eppes v. Cole*, 4 Hen. & M. 171; *Sutton v. Mandeville*, 1 Munf. 407; 1 Chitty on Cont. [11th ed.] 511-513; *Preston v. Hawley*, 139 N. Y. 300.) The opinion of the General Term is founded upon a plain misapprehension of the facts established by the verdict. Under the charge of the trial judge, the only issuable fact found by the jury was, that there was no agreement, express or implied, for the payment

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of rent. Every other fact in dispute was left unsettled and undetermined, as the court held, in terms, that in the absence of such an agreement, the plaintiffs could not recover. But the General Term have nevertheless affirmed the judgment below upon three assumptions of fact, none of which is supported by the verdict. (*Jackson v. Sears*, 10 Johns. 436; *Torry v. Black*, 58 N. Y. 185, 186; *Howell v. Mills*, 53 id. 322; *Sherman v. Wright*, 49 id. 228; *Foley Case*, 138 id. 333; *In re Wendell*, 32 Hun, 545; *Knothe v. Kaiser*, 2 id. 515; *In re Kane*, 2 Barb. Ch. 375; *Beardsley v. Hotchkiss*, 30 Hun, 607, 618; *Kelaker v. McCahill*, 26 id. 149; *Clark v. Montgomery*, 23 Barb. 465; Tyler on Infancy, 292-298; *Dedham v. Natick*, 16 Mass. 135; *Nightingale v. Wittington*, 15 id. 272-274; *Furman v. Van Sise*, 56 N. Y. 435; *Taylor v. Hill*, 87 Wis. 669.)

*Matthew Hale* and *Henry A. Strong* for respondent. The plaintiffs made out no case against the defendant, and should have been non-suited. (*Smith v. Stewart*, 6 Johns. 46; *Benjamin v. Benjamin*, 5 N. Y. 383, 388; *Thompson v. Bowe*, 60 Barb. 463; *Sylvester v. Ralston*, 31 id. 286; *Hall v. Southmayd*, 15 id. 32, 36; *Preston v. Hawley*, 101 N. Y. 586, 588; 139 id. 296, 300; *Collyer v. Collyer*, 113 id. 442; *Clark v. Clark*, 58 Ill. 527; *Whitman v. Bowe*, 56 Hun, 141; Schouler's Dom. Rel. [2d ed.] 325, 326; *Wilkes v. Rogers*, 6 Johns. 566; *Thompson v. Brown*, 4 Johns. Ch. 619; *In re Bostwick*, Id.; *Whipple v. Don*, 2 Mass. 415; *Williams v. Hutchinson*, 3 N. Y. 312; *Ross v. Hardin*, 79 id. 84, 90; *Beardsley v. Hotchkiss*, 96 id. 201, 221; *Ryan v. Bolts*, 16 J. & S. 152-154; *Elliott v. Gibbons*, 30 Barb. 498; *Gladding v. Follett*, 2 Dem. 58; 95 N. Y. 652.) The claim of the plaintiffs cannot be sustained upon the theory advanced by appellants' counsel upon the appeal to the General Term and insisted upon in their brief in this court, that the action may be considered as equivalent to a bill in equity for an accounting or as an action of tort. (*Hurd v. Miller*, 2 Hilt. 540; *Henwood v. Cheeseman*, 3 S. & R. 500; *South-*

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*wick v. F. N. Bank*, 84 N. Y. 420, 428, 429; *Truesdell v. Sarles*, 104 id. 164, 167; *Reed v. McConnell*, 133 id. 425, 434; *People v. Townsend*, 19 Hun, 137; 80 N. Y. 656; *Walter v. Bennett*, 16 id. 250; *Matthews v. Cady*, 61 id. 651; *Ross v. Mather*, 51 id. 108; *Reubens v. Joel*, 13 id. 488; *Goulet v. Asseler*, 22 id. 225; *Gould v. C. C. N. Bank*, 86 id. 75, 83; *Hicks v. Sallett*, 3 De G., M. & G. 752.) There were no errors prejudicial to the plaintiff in the admission or exclusion of evidence. (*Mead v. Shea*, 92 N. Y. 122; *Stark v. People*, 5 Den. 106; *Plet v. Bouchard*, 4 Edw. 30; *Richardson v. Northrup*, 66 Barb. 85; *Starr v. Craigen*, 24 Hun, 177; *Schultz v. T. A. R. Co.*, 89 N. Y. 242, 249.)

PECKHAM, J. James Lamb died in January, 1885, leaving him surviving the defendant, his widow, and the plaintiffs, being his three infant children, of the ages of five years, three years and one year respectively. The deceased left property, real and personal, of the amount of about \$75,000. At the time of his death he was living in his own house in Cohoes with his wife and children. Some time in the summer of 1885 James White was, upon the petition of the defendant, appointed the general guardian of the infants by the surrogate of Albany county. Soon after his appointment as guardian he and the defendant had a conversation, the particulars of which, in some respects, they do not agree upon in their testimony in this case, but they do agree in the statement that the guardian was to allow Mrs. Lamb, the defendant, a total of \$1,000 a year for the three children for their maintenance and clothing. The defendant and her children continued to live in the house from the time of the death of Mr. Lamb, and no demand had ever been made upon the defendant for the payment of any rent for the occupation thereof until the writing of a letter a few days before the commencement of this action. The defendant has in the meantime taken care of the children and acted towards them as their natural guardian. On or about January 29, 1891, Mr. White wrote Mrs. Lamb a letter, in which he said that recent events had

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led him to make an investigation as to the defendant and the estate of Mr. Lamb, and of his rights and duties as general guardian of the property of his children, and he said that he was advised, and that it appeared to be his imperative duty as such guardian, to charge and collect from her a reasonable rent for the house and grounds belonging to the estate and occupied by the defendant since the death of her husband. The defendant refused to pay any rent for the time during which she with her children had occupied the house, and Mr. White then, by order of the county judge, was appointed guardian *ad litem* of the infants, and commenced this action in their name by himself as such guardian *ad litem*.

The complaint alleges that the plaintiffs since January 18, 1885, have been the joint owners of the premises which, since the last of February, 1885, had been used and occupied by the defendant as a residence, and that such use and occupation was reasonably worth the sum of \$600 per year, no part of which had been paid although the defendant had been requested so to do by the general guardian of the property and of the plaintiffs. The complaint further alleged that the plaintiffs were under the age of fourteen years and that James White had been duly appointed their guardian *ad litem* by the county judge of Albany county before the commencement of this action. Judgment was demanded that plaintiffs recover of the defendant the sum of \$3,575, with interest as stated. The defendant answered, and after alleging the general facts which have been above stated alleged, further, that the general guardian, James White, advised this defendant to continue to reside in the dwelling house with her children, and consented to such residence on her part, and that he had never asked or required the defendant to pay any rent, and that she had occupied the premises since the death of the intestate, her husband, in pursuance of an agreement with the general guardian by which she was not to pay rent, but was to provide a home for the plaintiffs and pay one-third of the taxes and assessments and one-third of the repairs to be made upon the house; and she denied that she had occupied

the house under or in pursuance of an agreement with the general guardian by which she was to pay any rent.

Upon these pleadings the parties went to trial. It will be seen that the suit is somewhat extraordinary in character. The three children of the defendant living with her in the house in which their father and the defendant's husband died, the children being still very young (all of them under the age of fourteen years) are yet in form suing their mother to obtain the payment of rent for her use and occupation of this house, where the plaintiffs have been cared for and nourished by the defendant, their mother. The trial of the case developed the reason for its existence. It appeared that the general guardian a short time before the writing of the letter above alluded to had a personal misunderstanding with the defendant in relation to matters having no connection with this subject in dispute, and immediately thereafter he receives this light in regard to his duty as guardian and writes the letter above mentioned making demand for rent, and upon the refusal of the defendant to pay it he procures himself to be appointed guardian *ad litem* and commences this action in the names of these infant daughters of the defendant. There can be no doubt as to the real motive for the action. While it may have no bearing upon the questions of law which are involved herein, it is proper to state the fact because of the exception taken by the plaintiff to the ruling of the court which allowed the defendant to prove a quarrel and the remarks that were made by the general guardian to the defendant at that time. It will be seen that the action, so far as it is shown by the complaint, is one for use and occupation, although there is no allegation therein of any agreement on the part of the defendant to pay rent. The fact is alleged that the plaintiffs are infants under the age of fourteen years, and that James White has been appointed their guardian *ad litem*. Upon the facts which have been stated, and which are substantially all the material ones which were proved, the learned trial judge held that there must be some agreement, either expressed or implied from the circumstances, to pay



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rent on the part of the defendant, and if there were no such agreement no recovery could be had. The court submitted to the jury the question whether or not such an agreement had been proved, and it permitted them to infer an agreement to pay rent from the circumstances proved in the case, if they thought such inference were a proper and natural one. The jury found for the defendant, thus negating the existence of any agreement to pay rent, either expressed or implied. So far as the complaint should be held to be one to recover rent for the use and occupation of these premises in the technical sense of that expression founded on the statute, the action cannot be maintained without proof of some agreement to pay rent, either expressed, or implied from the possession of the lands and other circumstances, so that the conventional relation of landlord and tenant may be said to have existed between the parties. (*Collyer v. Collyer*, 113 N. Y. 442; *Preston v. Hawley*, 139 id. 296.)

The plaintiffs, however, argue that there is stated in the complaint enough to allow of a recovery in the nature of one for use and occupation founded upon the fact of an entry upon the lands of the infants by one who had not the legal right to occupy as against them, and who, therefore, was to be regarded as entering in the character of a guardian or bailiff of the infants, and liable to account for the rents and profits of the land while so in possession. We assume that if the plaintiffs proved a state of facts from which an illegal entry or intrusion upon the lands of the infants would follow, an action might be maintained by the infants upon their arrival at age, or by their guardian before such time, against the person thus intruding, for the recovery of the rents and profits, or, in other words, for the value of the use and occupation of the lands thus intruded upon.

The cases cited in the very learned and exhaustive brief of the plaintiffs' counsel, would seem to prove this beyond all controversy, and indeed we should say that it was quite a plain proposition. It might be questionable whether the complaint set forth any such cause of action. Aside from the

question of pleading, however, we do not think the facts proved and found show any such case. Upon the death of James Lamb, the intestate, these infant plaintiffs and their mother, the defendant, continued living in the house where they had all resided up to his death. The mother was entitled to dower. They were helpless infants; their mother was their natural guardian. She remained in the house after her husband's death, protecting, caring for and supervising them. Upon such facts we might well hold there was no wrongful, illegal or improper intrusion or entry upon the lands of these infants. They were themselves in actual occupancy of the house, having the benefit thereof and the title thereto; the defendant caring for and protecting them in such occupancy, and not in fact converting any profits to her own use, or receiving any thing as profits of an adverse occupation and possession. There are other facts, however, and it is unnecessary to decide upon the legal effect of the above in the absence of any agreement whatever.

Upon defendant's petition Mr. White was appointed the general guardian of the infants, and in that petition the fact was stated that they were residing in this house and that no rent arose therefrom. This fact was known by the proposed guardian, and from the time of his appointment he had acquiesced in the defendant's residence in that house while taking care of and maintaining the children, and such acquiescence continued until a short time subsequent to the quarrel above mentioned, when the demand for rent was for the first time made. The guardian during this time not only acquiesced in but consented to and advised such residence, and by the finding of the jury, taking into consideration the issues made by the answer of the defendant and the testimony of Mr. White and the defendant, and the manner in which the question was submitted to the jury, it can be stated and maintained that he not only consented to such occupation, but that he agreed affirmatively that no rent should be charged and that the \$1,000 allowed, taken in connection with the occupation of the house, should be the allowance to the defendant.

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out of the property of the infants for their care, clothing and board. The 'plaintiffs' counsel alleges that the question whether such agreement existed was not submitted to the jury, and that the only question submitted was whether there was an affirmative agreement on the part of the defendant to pay rent, or whether from the circumstances proved in the case the jury should imply one. I think such is not the limitation to be given to the charge of the court. The affirmative agreement was set up in the answer. The guardian and the defendant were both sworn upon the trial. They both testified to a certain conversation taking place in regard to these children and to the amount which should be allowed for their maintenance and upon the subject of rent. The guardian testified distinctly that in that conversation there was no agreement to pay any specified sum for rent, but he alleges that from the course of the conversation it was assumed and stated that the question of rent was one to be submitted to or decided by the surrogate, and that the defendant would pay whatever the surrogate decided was proper. The defendant, in testifying in regard to that conversation, and assuming to give its substantial import, stated that the agreement was that she was to have \$1,000 annually for the support of the three children, and that she should keep the children and should have the use of the house until the youngest child came of age, on payment by her of the taxes, insurance and repairs, and he advised her to stay there on those terms. While the learned court charged that there must be found either an express agreement to pay rent or an implied agreement arising from the circumstances submitted to the jury, he left it to the jury to say which of these stories, as given by the guardian and the defendant, they believed. The testimony of the defendant was not a mere denial of that of the guardian, but it was a positive statement as to what the agreement was, and as defendant stated it her evidence was not alone totally inconsistent with and contradictory to that given by the guardian, but it stated an affirmative agreement as to the rent. So, when the testimony of the

guardian and of the defendant on this point was submitted to the jury, and it was left to them to say which of the two witnesses they were to believe, it was in substance and effect a submission of the question as to what was the agreement, and a verdict for the defendant involves a finding, not only that there was no expressed agreement to pay rent, and that there was no implication of an agreement arising out of the circumstances, but a finding that the defendant's evidence was true, and that evidence proved the agreement relied on by defendant. The agreement, as testified to by the defendant and found by the jury, was inconsistent with the idea of any unlawful intrusion upon the lands of the infants or any liability to pay rent therefor. We think the plaintiffs' claim that the testimony was contradictory as to the agreement to pay rent, and that the question of the agreement as sworn to by defendant had not been submitted to the jury, is not justified by the charge of the judge, and the argument of plaintiffs, which is based upon such claim, must fail. Under such circumstances, the continuation of the mother in the house furnishes no basis of a claim for use and occupation. It is further urged that this agreement, even if made, was one which would not bind the infants, unless it were a reasonable one, and that evidence addressed to the question of the reasonable character of the agreement offered by the plaintiffs was excluded by the court upon the objection of the defendant. The evidence which the counsel for plaintiffs claims should have been admitted upon this point was that which he offered for the purpose of showing that the defendant had, on some occasions, taken these children with her to the country and obtained board for them at rates of \$3, and even as low as \$2.50 per week for each of them. It appeared that the mother upon all these occasions, with one exception, accompanied her children for the purpose of taking care of them. We think the fact if proved was wholly immaterial, and had no bearing whatever upon the question of the reasonable character of the agreement which the defendant alleges was made between herself and this guardian. That she was enabled for

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a short time in each summer to obtain board for herself and her children at a small rate in the country had no proper bearing upon the question.

The court permitted the defendant, under the plaintiffs' objection, to testify to a quarrel between the defendant and the guardian just prior to the time when he wrote the letter making his demand for rent. The defendant testified that in that quarrel the guardian made threats against her, and said that where he as guardian had saved her cents he would make her pay out dollars in more ways than one. It was objected to on the ground that the quarrel and dispute between these parties had no relation to his guardianship or administratorship of the estate. We think the evidence was admissible upon the well-grounded principle that it is always proper to show the feeling of a witness towards the party against whom he testifies, and for the purpose of thereby affecting the credibility of his testimony. It was particularly proper in this case. His evidence and that of the defendant were diametrically opposed, and to such an extent that it was quite plain neither could be honestly mistaken. It has frequently been held that such evidence is proper. (*Starkes v. People*, 5 Den. 106; *Schultz v. Railroad Co.*, 89 N. Y. 242.)

On the whole, we think the judgment is right, and it should be affirmed.

All concur.

Judgment affirmed.

In the Matter of the Estate of JOSEPHINE PATTERSON (Otherwise Known as JOSEPHINE WEST), Deceased.

Upon the death of J. letters of administration were issued to P. upon her estate, upon his petition, in which he alleged that he was J.'s surviving husband. No notice was given to the next of kin, and there was no appearance by them. P. filed his account, which was settled by the surrogate, who awarded payment of the whole surplus to him as husband. Subsequently the next of kin filed a petition alleging that P. was never married to J. and asking to have the decree on the accounting set aside and the assets paid over to them. The evidence showed and the surrogate

found that P. never had been the husband of the intestate and ordered that the letters of administration and the decree be revoked and vacated. On appeal the General Term reversed that portion of the surrogate's order which revoked the letters, on the sole ground that no such relief was asked for, but affirmed that portion vacating the decree. On appeal here it was claimed by P. that the unrevoked letters were conclusive proof of P.'s title as husband. *Held*, untenable; that while the unrevoked order appointing P. as administrator was conclusive as to his authority to act there was no estoppel making the reason which led to the granting the order a fact conclusively established as against the next of kin, who were not notified and did not appear; that they could waive their right to attack the order, and it could stand consistently with the relief asked for and granted.

*Hankin v. Turner* (L. R. [10 Ch. Div.] 372); *Porter v. Purdy* (29 N. Y. 106); *Caujolle v. Ferrié* (13 Wall. 465); *In re Roderigas* (63 N. Y. 460); *Bolton v. Schrieffer* (135 id. 65), distinguished.

Reported below, 79 Hun, 371.

(Argued May 24, 1895; decided June 11, 1895.)

APPEAL from part of an order of the Special Term of the Supreme Court in the first judicial department, made June 15, 1894, which reversed a decree of the surrogate of the county of New York so far as it vacated letters of administration of the estate of Josephine Patterson, deceased, to William H. Patterson, and affirmed said decree so far as it vacated a decree of said court passing and settling the accounts of said William H. Patterson as such administrator.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

*William H. Hamilton* for appellant. The issuance of the letters to Patterson was an adjudication that he was the husband of the decedent, and until they are first revoked by a direct proceeding for that purpose it remained *res adjudicata* in this proceeding to vacate the decree judicially settling his accounts, and to obtain a distribution of the estate by Patterson as administrator. (Code Civ. Pro. §§ 2591, 2660, 2662, 2685; 1 Greenl. on Ev. § 525; *Hankins v. Turner*, L. R. [10 Ch. Div.] 372; *Porter v. Purdy*, 29 N. Y. 106; *Van Steenburgh v. Bigelow*, 3 Wend. 42; *Caujolle v. Curtiss*, 13 Wall. 465; *Carroll v. Carroll*, 60 N. Y. 121; *James v. Adams*, 22

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How. Pr. 409; *Sheldon v. Wright*, 5 N. Y. 482; *Roderigas v. E. R. S. Inst.*, 63 id. 460; *Bolton v. Schriever*, 135 id. 65; *Plume v. H. S. Inst.*, 46 N. J. L. 211.) The petitioner had no interest in the estate, and could have no standing as a party. (Code Civ. Pro. §§ 2487, 2647; *In re Peaslee*, 73 Hun, 113.) But conceding the appellant's status as husband was open to attack in this collateral proceeding the decisions of the lower courts on the question of marriage, were against settled rules of law and in the face of the undisputed evidence in the case. (*Is re Harriott*, 145 N. Y. 540; *Rose v. Clark*, 8 Paige, 573; *Budger v. Badger*, 88 id. 546; *Clayton v. Wardell*, 4 id. 230; *Hines v. McDermott*, 91 id. 451; *Wilcox v. Wilcox*, 46 Hun, 37; *Hill v. Burger*, 3 Bradf. 432; *In re Christie*, 1 Tucker, 81; *Jackson v. Claw*, 18 Johns. 346; *Fenton v. Reed*, 5 id. 52; 2 Rice on Ev. 998; *Wilkinson v. Payne*, 4 T. R. 468; *Piers v. Piers*, 2 H. L. Cas. 331; 13 Jur. 569; *Rex v. Twynning*, 2 Barn. & Ald. 386; *Harrod v. Harrod*, 1 Kay & J. 4; 18 Jur. 853; *Goodman v. Goodman*, 5 Jur. [N. S.] 902; 28 L. J. Ch. 745; *Sichel v. Lambert*, 15 C. B. [N. S.] 181; 1 Greenl. on Ev. §§ 105, 200; *Gall v. Gall*, 114 N. Y. 109. The order of the General Term is appealable to this court. (*Libbey v. Mason*, 112 N. Y. 525; *In re Tilden*, 98 id. 434; *In re Flynn*, 136 id. 287.)

*Edmund Luis Mooney* for respondent. The courts below had power to revoke, for fraud, the decree judicially settling the appellant's accounts, as administrator, while allowing the letters of administration, issued to appellant, to remain in full force. (Code Civ. Pro. §§ 2472, 2473, 2481, 2591, 2660, 2661, 2666, 2730, 2743; *Knox v. Nobel*, 77 Hun, 230; *In re Underhill*, 117 N. Y. 471, 475; *In re Verplanck*, 91 id. 439, 450.) None of the exceptions to the admission or exclusion of testimony was well founded. (Code Civ. Pro. § 2545; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Hill v. Burger*, 3 Bradf. 432, 449.)

FINCH, J. Upon the death of the intestate, letters of administration were granted to Patterson as her surviving husband.

They issued upon his petition asserting that relation as his title and the foundation of his right, but without notice to the next of kin, or any appearance by them. At a later period he filed his account, and the same was settled by the surrogate awarding payment of the whole surplus to him as husband. Thereafter the next of kin filed a petition, alleging that he was never in any manner married to the deceased, but had obtained the whole estate by the false assertion of a husband's right, and asked to have the decree on the accounting and for distribution vacated and set aside, and that the assets in the hands of the administrator be paid over by him to the next of kin. The surrogate determined, and the evidence before him fully justified the conclusion, that Patterson was not and never had been the husband of the intestate, but lived with her only in a meretricious relation, and that, therefore, the letters of administration and the decree for distribution were each obtained by fraud and falsehood and should be revoked and vacated. An order to that effect was entered, but on appeal to the General Term so much of it as revoked the letters was reversed for the sole reason that the proceeding was not framed for such relief. The vacating of the decree for distribution was affirmed, and it is now said that such affirmance was error, because the unrevoked letters were conclusive proof of Patterson's title as husband and must uphold the decree of distribution until themselves vacated in a proper direct proceeding. That presents the sole question on this appeal. The appellant's argument is that the next of kin claim under and in affirmance of the order appointing Patterson administrator and cannot, therefore, at the same time attack it collaterally. But they do not attack it at all. They admit and recognize the authority of Patterson as administrator, and concede that the order unrevoked is conclusive proof of that authority. The Code gives such effect to the order, and, admitting its force, they ask that the lawful administrator make an honest and lawful distribution. There is no inconsistency in their position, for the order is not conclusive upon the reasons and facts, not jurisdictional, which



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led to it as against parties not cited, not appearing, and who have in no manner been heard in respect to them. The order does not fall, is not revoked, or even shaken in its authority by proof in the proceeding for distribution that Patterson never was, in fact, husband. There is no estoppel which goes behind it and makes the reason which led to it a fact conclusively established in a case where the next of kin were neither notified nor appeared. A creditor may be appointed where it appears that there is no next of kin. On his accounting can it be that the next of kin actually existing may not assert their right to distribution and contest the validity or amount of the creditor's debt? For them the question who shall distribute may be quite immaterial and induce a waiver of the prior right which might be enforced, but such waiver would be fatal if by it the question to whom distribution should be made is finally foreclosed. I can see no reason for such a doctrine. There is no attack upon the order granting the letters either collateral or direct. On the contrary, it may stand consistently with the relief asked. None of the cases cited by the appellant establish the doctrine for which he contends. Most of them were obviously cases in which the relief sought necessarily required the vacating or destruction of the prior order as in *Hankin v. Turner* (L. Rep. [10 Ch. Div.] 372), in which the suit was for administration, and the relief involved a vacating of the order of the Probate Division. *Porter v. Purdy* (29 N. Y. 106) states the familiar rule that an adjudication cannot be destroyed by a mere collateral attack. In *Caujolle v. Ferrié* (13 Wall. 465) there was a judgment of a state court in a suit for administration involving the question who was next of kin, in which all parties had been heard, and it was held conclusive. In the *Roderigas* case (63 N. Y. 460) it was a jurisdictional fact which was sought to be disproved to the necessary destruction of the order founded upon it. Here no jurisdictional fact was assailed, nor was the order founded upon it attacked or questioned. In *Bolton v. Schriever* (135 N. Y. 65) the plaintiffs in ejectment claimed

as heirs at law and could only succeed by annulling the probate of a will carrying the estate elsewhere, and sought to do so by contradicting the fact of inhabitancy. Obviously none of these cases furnish the rule in the one before us, for here the order may stand, and is left to stand, consistently with the relief granted.

What is said as to the conduct of the next of kin in so long postponing their attack will assume importance if the sureties of Patterson are sued, but is at present immaterial.

We see no reason for disagreement with the General Term and its order should be affirmed, with costs.

All concur.

Order affirmed.

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ELIZABETH S. EDGECOMB, Appellant, v. SARAH E. BUCKHOUT,  
as Administratrix, etc., Respondent.

Plaintiff, an unmarried woman, entered into the service of W., defendant's intestate, as a housekeeper, and to render such other services as should be required of her, under an agreement that she was to be compensated for her services by certain specified provisions in his will. Plaintiff having received and accepted an offer of marriage, notified W. thereof, stating to him her willingness to carry out and continue the performance of her contract, and that her proposed husband was entirely willing she should do so. W. refused to receive her services as a married woman, and discharged her soon after she married. In an action upon the contract, *held*, that the mere fact of a contemplated marriage, or the marriage itself, did not necessarily as matter of law disqualify plaintiff from rendering the services contemplated in the agreement; and so, that the question as to whether the marriage afforded ground for plaintiff's discharge was properly submitted to the jury.

It appeared that W. was a man of wealth, and that his establishment was conducted on a lavish scale of expenditure. Plaintiff called M. as a witness, who testified that she had conducted boarding houses of the highest class in the city of New York, had hired many housekeepers and paid them their wages, and that their services were fairly worth the amount paid, which was stated. This testimony was received under objection and exception. *Held*, no error.

Said witness also testified that she had seen plaintiff at various times doing sewing of all kinds and mending for W. The witness was then asked and permitted to answer as to the value of such services, assuming that

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they were in each month of about the same proportion as when named by the witness. This was objected to, among other things, on the ground that the complaint merely set forth the employment of plaintiff as a housekeeper, and this did not include plaintiff's services as a seamstress. *Held*, untenable.

Defendant appealed from an order denying a motion for a new trial, made upon the minutes of the judge, and also from the judgment entered on the verdict. The General Term reversed the judgment. Its order was upon plaintiff's motion amended, so as to show that the reversal was upon exceptions alone, and the order denying a motion for a new trial was affirmed upon the facts. *Held*, that the questions reviewed by the General Term upon appeal from the order denying a motion were not before this court, and as to them it had no jurisdiction, and as it appeared that the reversal of the judgment was upon questions of law only, they were reviewable here.

*Edgecomb v. Buckhout* (88 Hun, 168), reversed.

(Argued May 27, 1895; decided June 11, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 10, 1894, which reversed a judgment in favor of plaintiff entered upon a verdict, and also reversed an order denying a motion for a new trial, and granted such motion.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Daniel B. Thompson* for appellant. No available exception was taken by defendant's counsel. (*Merritt v. Campbell*, 79 N. Y. 625; *Nay v. Curley*, 113 id. 575; *McGean v. M. R. Co.*, 117 id. 219.) The question as to whether the marriage of the plaintiff made it practically impossible for her to continue to perform such services as she agreed to perform as housekeeper for the decedent, is clearly a question of fact, and the trial justice committed no error in denying the motion to dismiss the complaint or in refusing to direct a verdict for the defendant. (*Justice v. Lansing*, 52 N. Y. 323; *Stokes v. Johnson*, 57 id. 673; *Hackford v. N. Y. E. R. R. Co.*, 53 id. 654; *Meade v. Parker*, 111 id. 262.)

*Louis O. Van Doren* for respondent. The rule is well settled in this state that if the master for good and sufficient

cause discharge the servant before the expiration of the term of service, or if the servant, without good cause, quits service before the end of the term, he can recover nothing for the part of the term past nor for the future. (*Turner v. Kourvenhoven*, 100 N. Y. 119, 120; *Lacy v. Getman*, 119 id. 109; *King v. St. John*, 9 B. & C. 896; *Stoney v. F. T. Co.*, 17 Hun, 579; *Huntington v. Claffin*, 38 N. Y. 182; *Spain v. Arnott*, 2 Starkie, 256; *B. F. Co. v. Glasscock*, 36 Alb. L. J. 43; *Foot v. Sabin*, 19 Johns. 158; *Lomer v. Meeker*, 25 N. Y. 361.) This respondent has practically never had the benefit of a review of the facts of the case as far as they relate to the propriety of the verdict. (*Ehrichs v. DeMill*, 75 N. Y. 370; *Harris v. Burdett*, 73 id. 136; *Snebley v. Conner*, 87 id. 218; *Kennicutt v. Parmalee*, 109 id. 650; *Williams v. R. R. Co.*, 127 id. 643.)

PECKHAM, J. The plaintiff brought this action to recover for services as housekeeper, which she alleged in her complaint herein she had performed for one Eckford Webb under an agreement that she should perform them up to the death of Mr. Webb, he agreeing with her that she should be compensated for such services by a provision in his will, by which she would have a life estate in the house No. 78 Rush street, in the city of Brooklyn, \$5,000 in cash and \$3,000 in value of railroad bonds. The plaintiff alleged the performance of the contract on her part, the death of the other party to the agreement, Mr. Webb, and his failure to make any provision for her in his will. It was also alleged that the reasonable compensation for the services actually performed by the plaintiff would be the sum of \$18,000, no part of which had been paid to the plaintiff, and she demanded judgment therefor against his administratrix, with interest from October 1, 1893, the date of the death of Mr. Webb.

The defendant put in an answer denying the agreement, alleging that the plaintiff had been fully paid for all services rendered by her to the deceased, and also alleging that the plaintiff, long prior to the death of Mr. Webb, had herself

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terminated, canceled, discharged and abandoned the contract. Other defenses were set up in the answer which are not necessary to state.

It appeared upon the trial that the deceased, Mr. Webb, was a man about sixty years of age, very large in person and somewhat helpless on that account. Sometime in 1881, he engaged the plaintiff, who was then an unmarried woman of about forty years of age, to become his housekeeper and to perform such other services as might be required of her from time to time. The agreement was that the plaintiff should perform such services for Mr. Webb up to the time of his death, for which she was to be compensated as stated in the complaint. Pursuant to the agreement the plaintiff then entered into the service of Mr. Webb and remained in his service between eight and nine years. She proved the character of the services which she rendered, which were not alone those pertaining to an ordinary housekeeper, but included services of a personal nature, necessitating constant attendance upon Mr. Webb. They included also the purchase of supplies for the house and table, the hiring of servants, the superintendence of their work, paying the bills of the establishment, attending to the sewing and mending and doing many other services which were stated in detail by the plaintiff and her witnesses. Sometime in the spring or early summer of the year 1889, the plaintiff left the service of Mr. Webb under circumstances which she stated in her testimony. They were in substance that upon informing Mr. Webb that she had received an offer of marriage from her present husband, Mr. Edgcomb, and asking his advice as to her acceptance of it, he stated that he had no advice to give and became quite angry. The conversation was continued regarding the question of her ability to render to Mr. Webb the services which she had theretofore rendered, if she married Mr. Edgcomb, and Mr. Webb said that she would not be able to render him such services, that her husband would not permit it and that he would not have any married man around his house. The plaintiff replied that she had spoken with Mr.

Edgecomb in regard to the matter and that he was perfectly willing that she should continue to render the same services that she had before rendered and that unless he were willing that she should do so she would not marry him. In addition she said she would if Mr. Webb preferred it take a house with her husband and give to Mr. Webb the best rooms in it and render to him the same services she had heretofore rendered him; or if he chose she would have Mr. Edgecomb come to the house and she would continue to give the same services to Mr. Webb under those circumstances; or she would have Mr. Edgecomb remain where he was and she would in that case continue to render the services until Mr. Webb died, and that during the little space of a wedding tour which she would like to take, she would have her stepmother come and perform the same services for Mr. Webb that the plaintiff had been performing. The testimony shows that it was not an alternative demanded on the part of the plaintiff that the contract should be modified, from that which was originally made. The evidence shows a statement on her part of her willingness to stand by the contract that she had made and a statement that her proposed husband was entirely willing that she should do so, and then she offered at the option of the deceased other propositions in relation to taking a house, etc., which have just been stated.

The result of it was that Mr. Webb discharged her and gave her three weeks in which to leave his house. It is plain and the jury have found that the discharge was given by Mr. Webb solely for the reason that he refused to accept the services of plaintiff as a married woman, and his notification to her that she might have three weeks in which to leave was based solely upon his determination to refuse at all events the services of the plaintiff as a married woman. He stated that he would not have a married woman, and that he wanted an unmarried woman to perform the services which he required.

The plaintiff left the house pursuant to the notification of Mr. Webb and soon thereafter was married to Mr. Edgecomb, and the two left for Europe. They were gone several years and

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returned a short time prior to Mr. Webb's death, in October, 1893, and soon after that event the plaintiff brought this action to recover for the value of the services performed by her during the time that she was in his employ.

The learned judge upon the trial submitted to the jury the question as to what the terms of the agreement between Mr. Webb and the plaintiff were. If they found that the agreement was as testified to on the part of the plaintiff, the second question submitted to them was that relating to her performance of the agreement thus proved. He stated to the jury that the contention on the part of the plaintiff was that she had been ready, willing and able at all times to continue to serve Mr. Webb, and that the relations between them were severed not by any wrongful act on her part, but by some wrongful act on his part, and she claimed that his discharge of her was wrongful in the sense that her contemplated marriage did not constitute any just ground in and of itself for her discharge.

The learned judge then said to the jury: "If the effect of the marriage of the plaintiff with Mr. Edgcomb was such as to render it practically impossible for her to continue thereafter to render the services as housekeeper which were contemplated by the agreement between her and Mr. Webb, this contract was ended by her act, and as the contract is an entirety, she lost all right to recover in the action. \* \* \*

"She testified that the husband was entirely willing to allow her to remain there just as she had remained before, to allow her to do just what she had done before, to perform all those various services which have been narrated with so much detail in your hearing during this trial, and you are asked to conclude, therefore, that there was no necessary obstacle to the continuance of that relation arising out of the new relation which she was about to form and did form with the gentleman who became her husband. In other words, you are told that this new relation was not incompatible with the continuation of the old one, and that the husband had no claims or rights

as to his wife which rendered it improper, if not impracticable, for her to go on and do what she had been doing before.

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"I leave it to you as a question of fact to determine whether or not the effect of the marriage was to render it practically impossible for the plaintiff to continue to render the same services as she had rendered before. \* \* \* If you shall find that the effect of the marriage she was about to contract took it out of her power to perform the contract, then she cannot recover at all. If such was not the effect of the marriage, and if you shall find that it was practicable for her to go on and do just what she did before, and that Mr. Edgecomb, her husband, was willing that she should go on and do just as she did before, then Mr. Webb was not in a position to break off the relations till something actually occurred which made it certain that she could not go on.

"Of course, he was under no obligations to make any change in his household to accommodate the husband. He was under no obligation to admit him there, either as the spouse of this lady or as a visitor for any purpose whatever, or to sacrifice one moment of the time which the plaintiff engaged should be devoted to him in order that she might devote it to her husband; but he was not justified in breaking off the relation if it were practicable that the relation should continue as it had continued and as it was intended to continue by the contract, if she did everything to render such a result possible."

Several written questions were submitted to the jury, which they answered. They found the agreement as testified to on the part of the plaintiff; they found that Mr. Webb dismissed plaintiff from his service because she became engaged to Mr. Edgecomb; they found that the marriage of the plaintiff to Mr. Edgecomb did not make it practically impossible for her to continue to perform such services as she had agreed to perform as housekeeper for Mr. Webb, and that the plaintiff did not voluntarily leave or abandon the service of Mr. Webb upon entering into her marriage engagement. Also that the plaintiff had not been paid for such services as she rendered



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to Mr. Webb. They also found that the fair and reasonable value of such services as the plaintiff rendered to Mr. Webb was \$85 per month, and they found a general verdict for the sum of \$8,330.

The defendant appealed to the General Term from the judgment entered upon the verdict, and that court held that the question respecting the right of the deceased to discharge the plaintiff should have been decided as a question of law by the trial court, and that as matter of law the marriage of the plaintiff wrought such a change in the plaintiff herself as to disqualify her from the performance of her contract with Mr. Webb, and that Mr. Webb was justified in construing her proposed marriage as a rescission of the contract on her part, and discharging her for that cause.

Treating the question as one of law simply, we are of opinion that the General Term erred in its conclusion as above stated. We agree that the services contracted for in this case were those entirely of a personal nature, admitting of no substitution of any other individual, either as master or servant. The master selected the servant and the servant chose the master. Submission to the master's will is the law of this contract, as it was of that in *Lacy v. Getman* (119 N. Y. 109-115). Of course the master's will must be lawful and reasonable, and of such a nature must be his orders, and a breach of the agreement to render such services as were therein provided for and intended in this case would be ample justification to the master for the discharge of the servant, the plaintiff herein. But we are of the opinion that the mere fact of a contemplated marriage, or the marriage itself, would not as matter of law render the plaintiff incompetent, or necessarily disqualified, to perform the services which had been contemplated in the agreement between the parties. The General Term is in error when the learned judge speaking for it says that the evidence showed the deceased Mr. Webb had contracted for the services of an unmarried woman. He had contracted for the plaintiff's services, and at the time she happened to be unmarried. But there was nothing in the nature

of those services which rendered it legally impossible for the plaintiff to perform them as a married woman, or which necessarily disqualified her from their performance upon her marriage. If her husband were entirely willing that she should perform them, and that she should remain in the house of Mr. Webb separated from her husband, he continuing to reside where he had resided up to that time, how can it be said as matter of law that this marriage necessarily rendered the plaintiff incompetent to perform her agreement? If, after the marriage had taken place, the deceased had found that the services of the plaintiff were not being rendered as they theretofore had been, on account of the fact that she had a husband who claimed any portion of her time and services, or who claimed or endeavored to exercise the right to be in the house of the deceased at any time, then there would have been justification for the discharge of the plaintiff by Mr. Webb. But so long as the plaintiff continued in the faithful performance of the agreement which she had theretofore entered into with Mr. Webb, the fact that the plaintiff had a husband would, under the circumstances, be wholly immaterial, provided, of course, that the husband claimed no right to and did not in fact come to the house of the deceased and made no claim for the presence or service of the plaintiff at his house or for her time. It is true that marriage is not only a contract but an institution, as said by the learned court below, and that it not only creates rights and makes obligations, but that it confers a status. But so long as the husband claims no rights arising from the marriage contract, and is on the contrary entirely willing that the wife shall continue as theretofore in the full performance, separated and apart from her husband, of her obligations to another, it cannot be said that the wife necessarily and simply by virtue of the marriage disables or disqualifies herself from performing her earlier agreement, and that as long as she does perform it in every respect as fully and completely as she ever did, and the husband claims and exercises no rights whatever over her or in regard to her other obligations or duties, the party with whom such

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earlier contract has been made has no right to treat it as rescinded on the sole ground of the marriage.

It was not error, therefore, of which the defendant can complain that the trial judge left it to the jury to say whether the fact of the marriage of the plaintiff afforded ground for her discharge by the deceased, for it left the defendant, his administratrix, a chance for success which was not open to her if the question were to be decided as one of law. The single fact of the marriage, when considered with reference to the other facts, did not furnish such ground.

As the General Term reversed the judgment and granted a new trial and the plaintiff has appealed from such order and given the usual stipulation that in case of its affirmance judgment absolute shall go against her, the defendant urges that even if the General Term were in error on the ground above stated in granting the new trial, yet still the order can be maintained on the ground of the error of the trial judge in the admission of certain testimony which will now be considered. The defendant alleges that the trial court erred in allowing the witness, Mrs. Mann, to testify to the value of the services of a housekeeper. The witness testified she had been in the habit of hiring household servants for many years in the city of New York. She had been the proprietress of several boarding houses of the highest class where very rich people, as she said, were accustomed to board, and where everything had been conducted, as she described it, "in first-class style." She had during that time hired many housekeepers and paid them wages for their services, and she testified that their services were fairly worth the amounts she had paid to them. She also said that housekeepers in her employ never did any sewing, never did any purchasing, never did any paying of bills, never did any hiring or discharging of servants. It had been proved that such services had been performed by the plaintiff for Mr. Webb. The witness gave her opinion of the value of the plaintiff's services, not including her sewing as a seamstress; and she also testified that she had seen the plaintiff at various times doing sewing

of all kinds, making sheets and pillow cases, mending clothing of the deceased and doing other things of that nature, and she testified that such services, assuming they were in each month of about the same proportion as they had been when noticed by the witness, were worth \$20 per month. The defendant objected to all this evidence in due time on the ground that it was incompetent and immaterial, and also on the ground that the witness was not shown to be an expert, and that the value of the services of the class of housekeepers engaged by the witness for work in such establishments as she conducted furnished no standard for measuring the value of the services of the plaintiff to the deceased Mr. Webb. It had appeared in evidence that Mr. Webb was a man of considerable means; that his establishment was conducted on quite a lavish scale of expenditures; that his table was of the best, furnished with wines and the best and earliest that the market afforded in the way of game, vegetables, fruit and other things; that he kept carriages and horses and lived, in fine, as a man of quite large means. It was also objected that the services of the plaintiff as a seamstress were outside of and beyond that which was alleged in the complaint, which merely set forth the employment of the plaintiff as a housekeeper, and that that was exclusive of any services of the nature of those of a seamstress, and, therefore, evidence of the value of such services was incompetent.

We are of opinion that these objections should not be sustained. The term "housekeeper" does not admit of any clear, accurate and arbitrary limitation as to the character of the services which are embraced within the duties of such a person. Those duties are not very strictly defined by such an expression. Generally speaking, we know that it has reference to services performed in the taking care of a house in connection with the inmates residing therein, but exactly what special and particular duties are to be regarded as embraced within the term must almost always be decided by the duties which are actually performed under the agreement as made. In this case the character of the duties was specifi-

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cally detailed by the plaintiff and by various witnesses, all of whom went at quite great length into a description of the same; and it is seen that the term housekeeper in fact embraced duties not limited by the mere control and taking care of the house itself. Probably it would be impossible to show the value of such services by any individual who had herself performed precisely the same kind of services for another individual situated exactly as was the deceased and in substantially the same neighborhood. Obviously all that the plaintiff could do in order to show the value of her services was to call those people who had been engaged in the hiring of individuals to do the same class of services in some respects, although not to the same extent or precisely of the same character as those which were performed by the plaintiff. For this purpose she called Mrs. Mann, who had been in the habit of hiring housekeepers to do such work as she described when on the stand, and not one of them had been hired to do all the services which had been performed by the plaintiff. It was competent to show that the housekeepers thus employed were paid a certain sum per month, and that their services were fairly worth the amount which was paid to them. The same may be said with regard to the value of the plaintiff's services as seamstress. Mrs. Mann knew the value of the services of such an individual engaged in substantially the same neighborhood and doing exclusively that kind of work; but, as the plaintiff did not confine herself exclusively to those duties, she did not earn as much in that capacity alone as did the hired seamstress, who devoted the whole of her time to that work. The witness assumed a certain proportionate time that the plaintiff gave to her work as a seamstress and gave as her opinion an amount which, as she thought, would be the fair value of the services thus performed. In this we see no error. It was, as we have said, the best that the situation permitted plaintiff to do; in other words, the best evidence that the nature of the case afforded, and, therefore, it was not incompetent, because it left the value of plaintiff's services as actually rendered somewhat indefinite and vague.

The defendant urges another ground for the affirmance of this order based upon the practice followed herein. It seems that the order as first made by the General Term was one simply reversing the judgment and granting a new trial. The action had been tried before a jury, and upon the coming in of the verdict a motion had been made to set it aside and for a new trial on the minutes of the judge. That motion was denied and an appeal by defendant was taken from the order denying it as well as from the judgment entered upon the verdict of the jury. Subsequent to the reversal of the judgment and upon affidavits of plaintiff's attorney and upon an order to show cause, the order of the General Term was, upon motion of the plaintiff, amended in such a way that the General Term reversed the judgment upon the exceptions alone, and it also ordered that the order of the trial court denying defendant's motion for a new trial should be, and it thereby was, affirmed upon the facts. The defendant's counsel now contends, as we understand him, that the questions reviewed by the General Term and arising upon the appeal from the order denying defendant's motion for a new trial on the ground that the verdict was against evidence and for excessive damages should be regarded as before this court. We are not authorized to exercise such jurisdiction. If the order of the General Term had stood as it was originally made and an appeal had been taken to this court, we should have had to dismiss the appeal or affirm the order with costs, because it would not have appeared under such circumstances that the reversal of the judgment by the General Term was founded on questions of law only, the facts having been passed upon adversely to the then appellant. The General Term knew what grounds it took in reversing the judgment and granting a new trial, and upon application to it by the plaintiff, after notice to the defendant, it deliberately amended its former order and showed that it had passed upon the facts and affirmed the order denying the motion for a new trial, and that it reversed the judgment upon exceptions, or, in other words, upon questions of law only, the facts having been passed upon by it unfavorably to the defendant.

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In this case, as in others, we can only review the questions of law arising upon the exceptions. (*Harris v. Burdett*, 73 N. Y. 136, 139; *Snebley v. Conner*, 78 id. 218; *Kennicutt v. Parmelee*, 109 id. 650; *Mickee v. Wood M. & R. M. Co.*, 144 id. 613.)

We think the trial judge committed no error prejudicial to defendant, and that the order of the General Term reversing the judgment and granting a new trial must be reversed and the judgment upon the verdict affirmed, with costs.

All concur.

Ordered accordingly.

LOUISA CARLSON, Respondent, v. MARIA L. WINTERSON,  
Appellant.

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Under the provision of the Code of Civil Procedure (§ 1323) providing that "when a final judgment or order is reversed on appeal the appellate court or the General Term of the same court, as the case may be, may compel restitution of property," etc., when a judgment of the City Court of New York has been affirmed by the General Term of the court, but subsequently reversed by the General Term of the Court of Common Pleas and the case remitted to the City Court for a new trial, and when pending the appeals the property of the judgment debtor has been sold on execution, a motion for restitution may properly be made at the General Term of the City Court.

(Argued June 3, 1895; decided June 11, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made February 5, 1895, which reversed an order of the General Term of the City Court of New York vacating and setting aside by virtue of an execution issued herein a sale by the sheriff of real estate which belonged to the defendant.

The facts, so far as material, are stated in the opinion.

*E. F. Bullard* for appellant. It is well settled that where a judgment is reversed, the court will promptly, as far as practicable, restore the party complaining to the possession of the land, and give him remedy for the money paid. (*Little*

v. *Little*, 94 N. C. 525; *Safford v. Stevens*, 2 Wend. 164; *Whitbeck v. Patterson*, 22 Barb. 83, 86; *Close v. Stuart*, 4 Wend. 98; Code Civ. Pro. § 1323; *Hayes v. Nourse*, 25 Abb. [N. C.] 95; *Wright v. Nostrand*, 109 N. Y. 616; *Genet v. D. & H. C. Co.*, 136 id. 217; *Heabler v. Myres*, 132 id. 363; *Murray v. Burdell*, 98 id. 480.)

*Hector M. Hitchings* for respondent. The General Term of the City Court was without jurisdiction to make the order of restitution. (Code Civ. Pro. §§ 323, 369; *M. N. Bank v. P. N. Bank*, 102 N. Y. 464; *Hayes v. Nourse*, 25 Abb. [N. C.] 96; *Young v. Brush*, 18 Abb. Pr. 171; *Coster v. Peters*, 7 Robt. 386; *Martin v. B. I. M. Co.*, 66 N. Y. 671; *Carlson v. Winterson*, 7 Misc. Rep. 689.) The order of the City Court was inequitable in that it set aside a sale under which important rights had accrued to other parties than the plaintiff. (*Woodcock v. Bennet*, 1 Cow. 711; *Wood v. Jackson*, 8 Wend. 9; *Lovett v. G. R. Church*, 12 Barb. 67; *Simpson v. Hombeck*, 3 Lans. 53; *Holden v. Suckett*, 12 Abb. Pr. 473.) The defendant has waived all rights under this motion by her subsequent motion to the Common Pleas, and upon the denial of that motion by bringing an action for restitution in which she has up to the present time been successful. (*Winterson v. Hitchings*, 10 Misc. Rep. 396.)

HAIGHT, J. The plaintiff recovered a judgment against the defendant for the sum of \$637.15 in the City Court of New York, which was affirmed in the General Term of that court, but subsequently reversed in the General Term of the Court of Common Pleas. In the meantime the sheriff had sold for the sum of \$711 certain real property of the defendant upon an execution issued upon the judgment to Hector M. Hitchings, the plaintiff's attorney, to whom the judgment had been assigned. No stay was procured pending the appeals. Upon the reversal of the judgment by the General Term of the Court of Common Pleas the case was remitted to the City Court for a new trial. Thereupon the defendant moved in the General Term of that court for an order setting



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aside the sale of her real estate, which motion was granted ; but on appeal to the General Term of the Court of Common Pleas the order was reversed.

It is contended that the General Term of the City Court had no power to make the order.

Section 1323 of the Code of Civil Procedure provides that : "When a final judgment or order is reversed or modified, upon an appeal, the appellate court, or the General Term of the same court, as the case may be, may make or compel restitution of property, or of a right lost by means of an erroneous judgment or order ; but not so as to affect the title of a purchaser in good faith for value."

The language used is somewhat obscure. Under the old Code of Procedure, the appellate court was empowered to award restitution. Under the present Code, the words, "or the General Term of the same court, as the case may be," have been added. What do they mean? Do they refer to the appellate court in which the judgment was reversed, or to the court in which the case has been remitted and is pending? If they refer to the court that reversed the judgment, they are surplusage and add nothing to the section. The question of restitution cannot always be disposed of by the appellate court at the time of the reversal of the judgment. Restitution cannot be ordered "so as to affect the title of a purchaser in good faith and for value." The facts with reference to the good faith of the purchaser would not appear upon the record, and consequently they must be presented upon an independent motion. No reason is apparent why they may not be considered by the court to which the case has been remitted, without further burden to the appellate court, and we are inclined to the view that such was the intention and the reason for the insertion in the Code of the new provision. It follows that the motion may be made in the court that reverses the judgment, or it may be made at the General Term of the court to which the case has been remitted and is pending, if that court has a General Term. If not, the motion must be made in the court that reversed the judgment.

The provisions of this section of the Code have received some attention in *Market National Bank v. Pacific National Bank* (102 N. Y. 464); *Wright v. Nostrand* (100 id. 616); *Hayes v. Nourse* (25 Abb. [N. C.] 96), and other cases, but in none of them have the provisions been fully considered and the practice made clear. We have, therefore, thought it advisable to reconsider the subject in order that there may be no doubt in the future as to the court in which the motion for restitution should be made.

The respondent in the opposing affidavits shows that the defendant has no property other than that sold, and, upon information and belief, that she has conveyed her interest in that property. Full justice may be done the parties by a modification of the order.

The order of the General Term of the Court of Common Pleas should be reversed, and that of the General Term of the City Court modified, so as to vacate the sale upon the defendant paying into court the sum of \$711 within such time as shall be fixed by that court, to abide the final determination of the action, without costs of this appeal to either party.

It concur.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.  
THOMAS G. COWAN et al., Respondents.

The limitation in the provision of the Code of Civil Procedure (§ 2458) providing for the examination of a judgment debtor in proceedings supplementary to execution, that "the judgment must have been rendered upon the judgment debtor's appearance or by a personal service of the summons upon him," was not intended to, and does not protect a judgment debtor who is liable personally and generally and against whom a general execution properly issues.

The word "appearance" means a voluntary submission to the jurisdiction in whatever form manifested.

The law permitting a judgment to be entered upon a recognizance in the city of New York after an order of forfeiture constitutes part of the undertaking, and the party executing it consents that in case of for-

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feiture judgment may at once be entered thereon, upon which a general execution may be issued, and this constitutes a voluntary appearance in the action.

Proceedings supplementary to execution issued upon such a judgment may, therefore, properly be instituted.

(Argued June 3, 1895; decided June 11, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made February 4, 1895, which affirmed an order of Special Term vacating and setting aside an order for the examination of defendant John Cahill in proceedings supplementary to execution.

Said Cahill, as surety with the defendant Thomas G. Cowan, entered into a recognizance for the appearance of the latter at the Court of General Sessions in and for the city and county of New York at a time fixed. Cowan having failed to appear at that time, an order was entered declaring the recognizance forfeited and thereafter judgment was docketed thereon and an execution issued which was returned unsatisfied. An order was subsequently obtained for the examination of Cahill in proceedings supplementary to execution, upon an affidavit which alleged the facts above set forth and also that no part of said judgment had been paid.

*Forbes Hennessey* for appellant. Supplementary proceedings may be instituted in any case where summary judgment is entered upon a forfeited recognizance. (Laws of 1884, chap. 315, § 8; Laws of 1861, chap. 333, § 3; Code Crim. Pro. §§ 595, 2458; *People v. Quigg*, 59 N. Y. 83; Laws of 1882, chap. 410, § 1480; *Joyce v. Spaford*, 9 Civ. Pro. Rep. 342; *Smith v. Mahoney*, 3 Daly, 285; *Pope v. Cole*, 64 Barb. 406; *Becker v. Torrance*, 31 N. Y. 631; *Orr's Case*, 2 Abb. Pr. 457; *Owen v. Dupignac*, 9 id. 180; *Sale v. Lawson*, 4 Sandf. 718; *Pierson v. People*, 79 N. Y. 433.) It is submitted that section 2458 of the Code, which was passed when the provisions for the entry of summary judgments on forfeited recognizances existed in precisely the same

form as they do to-day, should not be so construed as to defeat the beneficent purpose which was obviously intended to be accomplished by its enactment. (Code Crim. Pro. § 595; *People v. Quigg*, 59 N. Y. 83; *Gildersleeve v. People*, 10 Barb. 35; *People v. Lot*, 21 id. 130.) The signing of the recognizance by the defendants Cowan and Cahill, whereby they undertook to have the body of the principal in court at a time appointed, was a sufficient appearance to satisfy the requirements of section 2458. (*Bean v. Lowville*, 24 Hun, 353; *Davis v. Herrig*, 65 How. Pr. 290.)

*Benjamin Yates* for respondent. Proceedings supplemental to the return of an execution are now a special proceeding, and to entitle a judgment creditor to institute such proceeding, it must appear that the judgment was recovered either upon the appearance of the judgment debtor or personal service of the summons on him. (Code Civ. Pro. § 2458.) The judgment upon which this proceeding is founded was not entered upon the judgment debtor's appearance or personal service of the summons upon him, and a judgment debtor upon a judgment recovered upon a forfeited recognizance cannot be examined in proceedings supplemental to the return of an execution unsatisfied. (*People v. Quigg*, 59 N. Y. 83; Laws of 1882, chap. 410, § 1480; *Pfyfe v. Eimer*, 45 N. Y. 102; *Embury v. Connor*, 3 id. 511.)

FINCH, J. We are of opinion that the order for the examination of the judgment debtor in proceedings supplementary to execution was properly granted and should not have been vacated. The ground taken by the courts below is that such an examination is prevented by the limitation of the Code (§ 2458); that "the judgment must have been rendered upon the judgment debtor's appearance or by a personal service of the summons upon him." The purpose and scope of that limitation is quite plain. There are cases in which a formal judgment is rendered in which, nevertheless, the apparent debtor is not generally and personally liable, for the lack of

appearance or service of a summons, as actions begun by attachment or against joint debtors where some only have been served, in which the liability is confined to some specific property and does not end in a general execution. Manifestly, in such cases the defendant, affected only by the lien upon the specific property charged, and not personally liable beyond that, should not be subjected to the supplementary proceedings. But the limitation was not intended to protect a judgment debtor who is liable personally and generally, against whom a general execution issues, and all whose property is bound by it. There is no reason for a discrimination among debtors of that class and character. The peculiarity of a judgment on a recognizance in New York city does not make it one entered without appearance or service of a summons. These describe the two modes by which a court acquires jurisdiction of the person. One is voluntary, the other compulsory. In one the party by his consent submits himself to the jurisdiction; in the other he is brought into court against his will. To say that one who has neither submitted to the jurisdiction nor been subjected to it by service of a summons, may yet be liable to a personal judgment at the hands of the court would be to make judicial authority boundless. By the word "appearance" as used in section 2458 is meant the voluntary submission to the jurisdiction in whatever form manifested, and not the mere narrow and technical meaning, well enough in its place, indicated in section 421. That relates to an appearance after service of the summons and does not describe one which is altogether voluntary. One who confesses a judgment does not "serve a notice of appearance or copy of an answer or demurrer," and yet he certainly appears by his voluntary consent to the entry of the judgment. We have held that the law permitting judgment to be entered upon a recognizance in the city of New York after an order of forfeiture constitutes a part of the undertaking signed by the party contracting as if explicitly written out in it, and that by signing it the defendant consents that in case of forfeiture judgment may at once be perfected thereon upon which a

general execution may issue. (*People v. Quigg*, 59 N. Y. 83.) Such written consent to the entry of judgment constitutes a voluntary appearance in the action and submission to the jurisdiction, and does not exclude the right of the creditor to institute supplementary proceedings.

The original order should stand and the order vacating it and the affirmance by the General Term be reversed, with costs.

All concur.

Ordered accordingly.

In the Matter of the Petition of the SOUTHERN BOULEVARD  
RAILROAD COMPANY, Appellant.

When a petition, which institutes proceedings for the condemnation of real property, is properly and duly presented to the Supreme Court, that court is required, if no sufficient cause is shown in opposition, to make an order appointing commissioners to ascertain the compensation to be made to the property owner; and, when their report comes on to be confirmed by the court, then is the time for judicial action upon it, either in confirming it, or in setting it aside for irregularity or for error of law in the proceedings.

Where, therefore, in such proceedings, it appeared that the land proposed to be condemned was laid out as a boulevard under the provisions of chapter 290, Laws of 1867, section 24 of which prohibited the construction of rail or tramways thereon, without a special act of the legislature, and provided that in such case nothing should affect the owners' right to recover the full value of the land taken, as if the boulevard had never been laid out; and it also appeared that chapter 723, Laws of 1887, amended said section by excepting from said prohibition railroad companies organized under chapter 252, Laws of 1884, of which the petitioner was one, and the court refused to appoint commissioners, upon the ground that, as the act of 1887 had been held to be unconstitutional, it had no power to authorize proceedings under said act, *held*, that such power was conferred upon the Supreme Court by the General Railroad Law, and was not affected by the said act of 1887; that its provisions were for the consideration of the tribunal to be constituted by the order of the court or of the court itself upon the coming in of its report, and that the refusal to appoint commissioners was error.

(Argued June 3, 1895; decided June 11, 1895.).

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 6, 1895, which affirmed an order of Special Term denying a motion by the Southern Boulevard Railroad Company for the appointment of commissioners of appraisal to ascertain under the provisions of chapter 723 of the Laws of 1887 the compensation to be made to owners of property taken or to be taken by the petitioner.

The facts, so far as material, are stated in the opinion.

*Wm. N. Cohen* and *Henry L. Scheuerman* for appellant. The failure of the court below to recognize chapter 723 of the Laws of 1887 as constitutional was fundamental error. (Laws of 1867, chap. 290, § 24; Laws of 1884, chap. 252; *Craig v. R., etc., R. R. Co.*, 39 N. Y. 404; *C. R. Bridge v. W. Bridge*, 11 Pet. 420; *People ex rel. v. Newton*, 112 N. Y. 396; *Louisiana v. Mayor, etc.*, 109 U. S. 285; *Chase v. Curtis*, 113 id. 452; *Dartmouth College v. Woodward*, 4 Wheat. 517; *Fletcher v. Peck*, 6 Cranch, 87; *F. Bank v. Hale*, 59 N. Y. 53, 59; *Voorhees v. U. S. Bank*, 10 Pet. 449, 471; *Garrison v. City of New York*, 21 Wall. 196; *Freeland v. Williams*, 131 U. S. 405; *Nelson v. S. M. Parish*, 111 id. 716; *People v. French*, 10 Abb. (N. C.) 418; *Scofield v. R. Co.*, 43 Ohio St. 571; *Spofford v. B. R. R. Co.*, 4 N. Y. Supp. 388.) The contract which the General Term evolved from the act of 1867 is one which the legislature had no power to make. (Const. N. Y. art. 1, § 7; *Cooley's Const. Lim.* 356, 357, 386; *Kohl v. United States*, 91 U. S. 367, 371; *Seurl v. School District*, 133 id. 553; *People v. Kerr*, 27 N. Y. 211.) If it be held that the provisions of the statute of 1867, are, in any sense, a contract which the legislature had power to make, the contract is limited and conditional, dependent upon a contingency which has never arisen, and which by reason of the amendment to the Constitution in 1875, can never arise. (Const. N. Y. art. 3, § 18; *Tucker v. Ferguson*, 22 Wall. 527; *H. B., M. & F. R. R. Co. v. S. B. etc., R. Co.*, 41 Hun, 553.)

*Mitchell Erlanger* for respondent. The legislature having authorized the taking of the land for public use upon certain conditions could not abolish those conditions and treat the property as though no such conditions had been attached to its condemnation when first taken. (*In re S. B. R. R. Co. v. Spofford*, 58 Hun, 497.) The conditions imposed by section 24 of chapter 290 of the Laws of 1867 constituted a contract between the people and the owners, which could not be impaired by subsequent legislation. (*Vandermullen v. Vandermullen*, 108 N. Y. 195; *Story v. E. R. R. Co.*, 90 id. 160; *Lahr v. M. E. R. R. Co.*, 104 id. 289; *People v. Bd. Suprs.*, 4 Barb. 64; *Stephens v. Marshall*, 2 Chand. 229; *In re R. & C. R. R. Co.*, 67 N. Y. 242; *In re Washington Park*, 56 id. 144; *People ex rel. v. Common Council*, 78 id. 56.)

GRAY, J. The Southern Boulevard Railroad Company was organized under the act of 1884, (Chap. 252), as a street surface railroad company, to operate its franchises upon and along the surface of the Southern boulevard. It has instituted this proceeding to condemn the land of the defendant, by virtue of the provisions in the General Railroad Law and in the Code of Civil Procedure. The petition sets forth that the Southern boulevard was laid out as a public street in the city of New York under the provisions of chapter 290 of the Laws of 1867, entitled "An act to authorize the towns of Morrisania and West Farms to widen, make, extend and improve a highway in said towns, to be called the Southern boulevard." Section 24 of that act provided, in substance, that no rail or tramway should be constructed upon the boulevard, without a special act of the legislature first obtained; and that in case the legislature should, in the future, grant to any corporation the right to construct any rail or tramway, nothing in the act should be construed to affect the rights of landowners to recover the full value of the land taken, to the same extent as if the boulevard had never been laid out on said lands. Chapter 723 of the Laws of 1887 amended the section referred to; so as, in effect, to limit the prohibition



respecting the construction of any rail or tramway and to eliminate all that followed that prohibition in the section with respect to the rights of landowners, in case of a subsequent legislative grant of a franchise to any corporation; and substituted in lieu thereof a provision merely excepting from the prohibition a railroad company organized under the act of 1884. (Chap. 252.) The petition set forth the inability of the petitioner to acquire the defendant's real estate, for the reason that he claimed for the same the full value of the land to be occupied by the petitioner's tracks; whereas the petitioner desired to acquire an easement, or interest, in it at only a nominal value. Upon the presentation of the petition to the Supreme Court, at a Special Term thereof, the same was denied, "on the ground that said chapter 723 of the Laws of 1887 has been heretofore held to be unconstitutional and that the court has no power in the premises to authorize proceedings under the authority of said act."

This is evidently an effort on the part of the petitioner to secure a decision of this court upon the question of the constitutionality of the act of 1887, which the General Term of the first department had already passed upon (58 Hun, 497). The question is an interesting one, as we have hitherto had occasion to say in respect of it (143 N. Y. 258); but much as we should like to settle the doubts of counsel, with respect to the question, we cannot overlook the fact that no case is made out justifying us in an expression of our opinion.

It was error for the court below to hold that they had no power to grant the application of the petitioner. That power was conferred upon the Supreme Court by virtue of the provisions of the General Railroad Law and was not affected by the provisions of the act of 1887 referred to. It is very plain that those provisions only concern and affect the determination of the commissioners appointed upon such an application. Those commissioners when appointed by the Supreme Court, in proceedings for the condemnation of land, constitute the tribunal provided for by the Constitution, who shall determine both the law and the facts with respect

to the compensation to be awarded upon the taking of land. As it was said in the matter of this same petitioner, "they are judges of the law and the facts, so far as they relate to the compensation to be awarded." (143 N. Y. at p. 259.) Their determination, or report, is subject to review at a Special Term and at a General Term of the Supreme Court and it was intended that the question of compensation should be referred and confined to the action of the commissioners and of the Supreme Court. For the court below, therefore, to place its denial of the petitioner's application upon the ground of a want of power to authorize proceedings, because of the provisions of the act of 1887, was to misapprehend their effect and to make them relate, not to the question of the compensation which the commissioners were to pass and report upon, but to the authority of the Supreme Court to act upon a petition which institutes proceedings for the condemnation of real property. When such a petition is properly and duly presented to the court, the court is required, if no sufficient cause is shown in opposition, to make an order appointing commissioners for the purpose of ascertaining the compensation to be made to the property owner and when their report comes on to be confirmed by the court, then is the time for judicial action upon it, either in confirming it, or in setting it aside for irregularity, or for error of law in the proceedings, etc. Of course, the existence of the act of 1887 referred to is no cause for refusing the appointment of commissioners; for, as we have seen, its provisions are for the consideration of the tribunal to be constituted by the order of the court, or of the court itself, upon the coming in of the report.

It results from these views, that the order of the General Term affirming the order of the Special Term, which denied the application of the petitioner, should be reversed and the matter is remitted to the Supreme Court for further proceedings herein, without costs to either party.

All concur.

Ordered accordingly.

In the Matter of the PEOPLE ex rel. JOHN F. DOBSON,  
Appellant.

The rule that a special statute providing for a particular case and applicable to a particular locality is not repealed or modified by a subsequent statute, general in its terms and application, does not obtain where the intention of the legislature to repeal or modify the special law is clearly manifest.

Accordingly *held*, that chapter 710, Laws of 1892, which authorizes the board of fire commissioners, with the approval of the board of estimate and apportionment, in all cities, the population of which, according to the last census, exceeds nine hundred thousand, to fix the salaries of the members of the fire department, modifies the charter of the city of Brooklyn (§ 6, tit. 13, chap. 583, Laws of 1888), relating to the compensation of officers of its fire department, and it is the duty of the fire commissioner of that city to fix the salaries referred to, as provided in said act.

*In the Matter of the People ex rel. Dobson* (73 Hun, 583), reversed.

(Argued June 8, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which affirmed an order of Special Term denying an application by the relator for a writ of mandamus requiring the fire commissioner of the city of Brooklyn to fix and determine his salary as fireman of the fire department.

The facts, so far as material, are stated in the opinion.

*William P. Pickett* for appellant. This statute being a remedial one and designed to afford relief to a very deserving class of public servants, not being in any way penal in its character or in derogation of the common law, should receive a liberal construction for the purpose of advancing the remedy intended by the act. There can be no question whatever that the relator is within the reason of the statute. (Laws of 1892, chap. 61, §§ 306, 454, 677, 710; Laws of 1882, chap. 410, § 442; Laws of 1888, chap. 583, § 35; *Mangam v. City of Brooklyn*, 98 N. Y. 585; *In re N. Y. E. R. R. Co.*, 70 N. Y. 349; Laws of 1893, chap. 314, §§ 332, 391, 408, 434; Laws

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of 1887, chap. 218, § 582.) The remedy of mandamus is the only one which the relator can obtain. (*Dolan v. City of Brooklyn*, 55 Hun, 448; 129 N. Y. 646.)

*Albert G. McDonald* for respondents. It is a familiar rule of statutory construction governing the present case that a special statute providing for a particular case or applicable to a particular locality is not repealed by a statute general in its terms and application unless the intent of the legislature to repeal or alter the special law is manifest, and even although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by the special law, and that general acts are not held to repeal the provisions of charters granted to municipal corporations. The fact that the general act contains a clause repealing "all acts, etc., inconsistent, etc.," does not weaken this general rule of construction. (*B. C. Assn. v. City of Buffalo*, 118 N. Y. 61; *Endlich on Stat.* § 228; *McKenna v. Edmundstone*, 91 N. Y. 231; *Van Denbergh v. Village of Greenbush*, 66 id. 1; *In re Evergreens*, 47 id. 216; *People ex rel. v. Quigg*, 59 id. 88; *People ex rel. v. Palmer*, 52 id. 88; *Whipple v. Christian*, 80 id. 523; *People ex rel. v. Supervisors*, 40 Hun, 353; *Aldinger v. Pugh*, 57 id. 181.)

O'BRIEN, J. The relator is the foreman of one of the companies of the fire department of Brooklyn. This proceeding was instituted to compel the defendant, the Fire Commissioner, to fix his salary at a sum not less than \$1,800 per year. On the 29th of June, 1892, the commissioner acted and fixed the salary at \$1,700. The relator claims that this was \$100 less than the minimum prescribed by the statute. The only question is whether chapter 710 of the Laws of 1892 applies to the case. That act reads as follows:

"The board of fire commissioners in all cities of this state having, according to the last census, a population exceeding nine hundred thousand, are hereby authorized and empowered with the approval of the board of estimate and apportionment,

to fix and determine, from time to time, the salary of the members of the fire department; the chief of the department whose salary shall not be more than six thousand dollars nor less than five thousand dollars and the two deputy chiefs whose salary shall not be more than forty-five hundred dollars nor less than thirty-five hundred dollars and the chiefs of battalion whose salary shall not be less than twenty-seven hundred and fifty nor more than three thousand five hundred dollars; and to captain or foreman of the department whose salary shall not be more than twenty-five hundred dollars nor less than eighteen hundred dollars and to assistant foreman or assistant captain whose salary shall not be more than eighteen hundred dollars nor less than fifteen hundred dollars.

"The pay or compensation mentioned in the foregoing section shall be paid monthly to each person entitled thereto, subject to such deduction for and on account of lost sick time, disability, absence or fines, as the said board may by rules and regulations from time to time prescribe and adopt.

"All acts and parts of acts inconsistent with this act are hereby repealed.

"This act shall take effect immediately."

It became a law on the 20th of May, 1892. The compensation of officers of the fire department of Brooklyn has heretofore been regulated by the provisions of the charter of that city (Laws of 1888, chap. 583, title 13, § 6). The courts below have held that these provisions still remain unaffected by the later statute above quoted. This result was reached by the application of a principle well settled by a class of cases of which *McKenna v. Edmundstone* (91 N. Y. 231) is a leading one in which the rule is enforced that a special statute providing for a particular case and applicable to a particular locality is not repealed or modified by a subsequent statute general in its terms and application, although the terms of the general act would, when taken strictly and but for the special law, include the case provided for by the latter, and that general acts should be construed as not repealing or affecting the provisions of charters of municipal corporations. This rule,

however, does not obtain where the intention of the legislature to repeal or modify the special law or the charter is clear and manifest. When, by any reasonable or fair construction the two enactments can be made to work together, and each can be made to accomplish a different and independent result, a special or local statute will not be affected by a subsequent general law relating to the same general subject. But we think that it is too clear that the legislature intended the act in question to apply to Brooklyn for the application of the principle. To hold otherwise, it would be necessary to disregard the language and general scope of the act as well as the facts notoriously existing when the act was introduced and passed. The title declares that the law was to apply to the uniformed firemen in all the cities of the state having a population by the last census of more than nine hundred thousand. Such, also, is the language used in the body of the act. The last census referred to was that taken under the direction of the very legislature that enacted the law, and which was completed in February previous, nearly three months prior to its passage. This census showed that Brooklyn had then a population of more than nine hundred and fifty-seven thousand, a fact which, it must be assumed, was perfectly well known to all the members of the legislature. It is impossible to say, under these circumstances, that the legislation was intended for the city of New York alone. That city had by the same census a population of more than eighteen hundred thousand. It would be contrary to all reason and every probability that the legislature intended to include that city alone in the term "cities of over nine hundred thousand population." It is clear, from the language employed and from the result of the census which had then been made public, that it was the intention that the act should apply to Brooklyn also. It is said that the law could not apply to Brooklyn for the reason that the several boards and officers mentioned and designated in it are peculiar to the city of New York, and do not exist in the other city either as a part of its fire department or its municipal government. But it appears that in the latter city

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N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

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there are individuals and boards in the fire department and in the city government, who, under different names, exercise the same, or substantially the same or similar, powers, and are charged with similar duties as those who are designated in the act perform in the former.

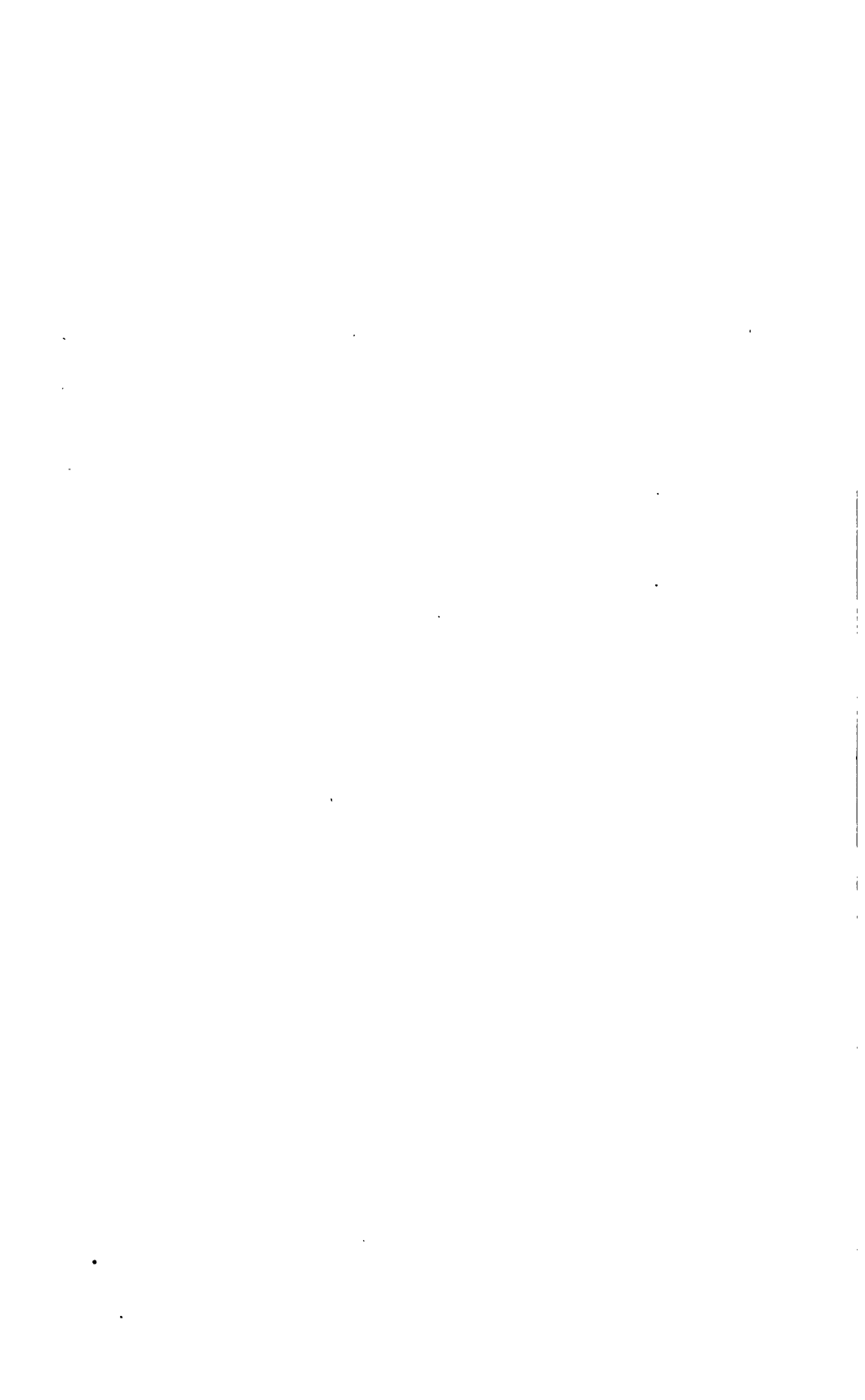
The general law of statutory construction (Ch. 677, Laws 1892, § 18) provides that where reference is made to special officers of a municipal corporation, or to a board of such officers, it shall be deemed to refer to a single officer holding such office when but one person is chosen to fill it in pursuance of law.

So we think that the statute in question operated to modify the provisions of the city charter so far as to confer upon the fire commissioner power to fix the relator's salary, from time to time, at a sum not less than \$1,800, and it became the duty of that officer to act under the new law when called upon by the relator to do so, or, at least, when fixing the salary. It is necessary, however, that the action of the fire commissioner shall be approved by the board of estimate, the financial body which, in Brooklyn, exercises the same or similar powers and performs substantially the same duties as the board of estimate and apportionment in New York. It is probably not very material whether such approval precedes or follows the action of the fire commissioner. It is certainly competent for the latter officer to act in the first instance and then submit his action to the board of estimate for its approval. It may be that it is discretionary with that board to approve the actions of the commissioner or to refuse. But we cannot say in this case that they will refuse, and since it appears that the commissioner has declined to act under the statute at all the order of the General Term and that of the Special Term should be reversed and the application for the writ of mandamus granted, with costs in all courts to the relator.

All concur.

Ordered accordingly.

SICKELS — VOL. CL. 46





# MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS  
VOLUME, WHICH ARE NOT REPORTED IN FULL.

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AMBROSE BEST, Respondent, *v.* LEVI ZEH, Individually, etc.,  
Impleaded, etc., Appellant.\*

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173	100

(Argued April 8, 1895; decided April 23, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 4, 1894, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term overruling a demurrer to the complaint.

*A. V. S. Cochrane* for appellant.

*A. Frank B. Chace* for respondent.

Agree to affirm on opinion below, with leave to appellant to withdraw demurrer and answer over.

All concur.

Judgment affirmed.

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MARY DAVIES, as Administratrix, etc., Appellant, *v.* PELHAM  
HOD ELEVATING COMPANY, Respondent.

(Argued April 8, 1895; decided April 23, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 12, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit dismissing the complaint.

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\* Reported below, 82 Hun, 232.

*I. Newton Williams* for appellant.

*George S. Coleman* for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. \_\_\_\_\_

ANN AMELIA SYKES et al., as Executors, etc., Respondents,  
v. THE SILVER LAKE ICE COMPANY, Appellant.

(Argued April 9, 1895; decided April 23, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 20, 1894, which affirmed a judgment in favor of plaintiffs entered upon a verdict and also affirmed an order denying a motion for a new trial.

*Forsyth Bros.* for appellant.

*Walter S. Hubbell* for respondents.

Agree to affirm ; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

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CHARLES T. BARNEY, as Administrator, etc., Appellant, v.  
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF  
NEW YORK, Respondent.\*

(Argued April 9, 1895; decided April 23, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 18, 1894, which sustained defendant's exceptions and granted a motion for a new trial.

*James A. Deering* for appellant.

*David J. Dean* for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

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\* Reported below, 78 Hun, 386.

ROBERT T. SKELTON, an Infant, by Guardian, Respondent, *v.*  
MATTHEW LARKIN, JR., Appellant.\*

(Argued April 10, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 4, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

*A. T. Clearwater* for appellant.

*David M. De Witt* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

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MAXIMILIAN TOCH, as Administrator, etc., Appellant, *v.*  
HENRY M. TOCH, Individually, etc., et al., Respondents.

(Argued April 10, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 16, 1894, which affirmed a portion of a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

*M. L. Townsend* for appellant.

*Edward C. Stone* and *Treadwell Cleveland* for respondents.

Agree to affirm; no opinion.

All concur, except GRAY, J., not voting.

Judgment affirmed.

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\* Reported below, 82 Hun, 388.

MAXIMILIAN TOCH, Individually, etc., Respondent, *v.* LUCAS TOCH et al., Individually, etc., Impleaded, etc., Appellants.

(Argued April 10, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 16, 1894, which affirmed those portions appealed from of a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

*Edward C. Stone* and *Treadwell Cleveland* for appellants.

*Louis Wertheimer* and *M. L. Townsend* for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. \_\_\_\_\_

EDWARD H. HAWKE, Appellant, *v.* MADISON G. HAWKE et al., Respondents.

ELIZABETH H. WILSON, Respondent, *v.* EDWARD H. HAWKE, Impleaded, etc., Appellant.

(Argued April 15, 1895; decided April 30, 1895.)

APPEALS from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 19, 1894, which affirmed a judgment establishing certain writings to be the last will and testament of Edward H. Hawke, deceased, entered upon a verdict directed by the court.

*John Foley*, *J. W. Houghton* and *J. S. L'Amoreaux* for appellant.

*John L. Henning* and *Charles E. Patterson* for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN MILLER, as Administrator, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued April 15, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 15, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*C. D. Prescott* for appellant.

*Myron G. Bronner* for respondent.

Agree to affirm; no opinion.

All concur, except FINCH, J., not sitting, and GRAY, J., not voting.

Judgment affirmed.

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AMBROSE J. AGATE, Appellant, *v.* CAROLINE E. HOUSE, Individually, etc., Respondent.

(Argued April 16, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of October, 1894, which affirmed a judgment in favor of defendant entered upon the report of a referee, and also affirmed an order denying a motion to correct, etc., the final judgment.

*George W. Blunt* for appellant.

*Henry W. Taft* for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Claim of NELSON DUNTZ, Respondent, v.  
WILLIAM L. HORTON et al., as Executors, etc., Appellants.\*

(Argued April 16, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 2, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

*E. C. Aiken* for appellants.

*Frank C. Cushing* for respondent.

Agree to affirm on opinion below.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

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DAVID M. BLAUSTEIN, as Administrator, etc., Respondent, v.  
EUGENE W. GUINDON et al., Appellants.

(Argued April 16, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*Arthur D. Williams* for appellants.

*G. Washburne Smith* for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

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\* Reported below, 83 Hun, 332.

WILLIAM H. FINLEY, by Guardian, etc., Appellant, *v.* HUDSON ELECTRIC RAILWAY COMPANY, Respondent.

(Argued April 16, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 18, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit dismissing the complaint.

*J. Rider Cady* for appellant.

*L. F. Longley* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. \_\_\_\_\_

SUSAN GEOGHEGAN, as Administratrix, etc., Appellant, *v.* THE ATLAS STEAMSHIP COMPANY, Respondent.

(Argued April 18, 1895; decided April 30, 1895.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made October 29, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit; also appeal from an order of said General Term, made June 2, 1890, which affirmed an order of Special Term denying a motion by plaintiff for the issuing of a commission.

The following is the opinion in full :

"This is an appeal from a judgment of the Court of Common Pleas for the city and county of New York affirming a judgment dismissing the complaint at the close of the trial, and from an interlocutory order denying a motion for a commission.

"The plaintiff seeks to recover damages for defendant's negligence in causing the death of her husband who fell from defendant's ship and was drowned.

"The complaint avers that defendant is a British corporation and its steamship 'Albano' sailed under a British register; that the intestate was assistant steward of the 'Albano,' and on the 11th day of September, 1884, while the steamship was on the high seas off the coast of the United States of Colombia, in the bay of Savanilla, or within the territory of that government, he met his death as stated.

"We were asked to consider several questions on this appeal.

"It was insisted that the jury should have determined whether the ship was on the high seas at the time of this accident or within the territorial limits of the United States of Colombia. If the ship was on the high seas, then did the law of the flag place the rights of the parties under Lord Campbell's Act (Ch. 93, Acts of Parliament, 9th and 10th of Victoria) which created a cause of action unknown to the common law against a person who, by his wrongful act, neglect or default, caused the death of another?

"If the ship was within the territorial limits of the United States of Colombia, was the plaintiff entitled to the commission moved for to prove the law in force in that jurisdiction at the time of the accident?

"The view we take of this case renders it unnecessary to pass upon these questions. We do not think there was evidence sufficient to authorize the jury in finding the defendant guilty of negligence and the deceased free from contributory negligence.

"On the evening of the accident, which occurred about eight o'clock and after dark, the iron doors of the forward gangway or port, on the starboard side of the ship, were left open, and the opening, instead of being guarded by the ordinary bulwark rail, was secured to a certain extent by a rope made fast on either side of the gangway, not stretched taut, but more or less slack according to conflicting evidence.

"It was a dark night, the ship rolled at her anchor and the waves were breaking against her side.

"It was proved that it was part of the duty of the deceased



to wash the silver after dinner and to pass out on deck and throw overboard the water used for that purpose.

"No one saw the deceased fall overboard, nor did any one see him go on deck. The second engineer of the ship testified he was on deck and heard a gurgling cry that led him to shout there was a man overboard; a rope was thrown over; a hand was seen lifted out of the water; boats were lowered and an unsuccessful search made; the roll was called and it was found intestate was missing.

"There is no direct proof as to how the deceased met his death; there is nothing to show that he fell through the open port, or that his exit from the ship was accidental.

"It is true a theory may be adopted which would lead to the moral conviction that his death was accidental while in the discharge of his duty and in the exercise of reasonable care, but all this falls very far short of sustaining the burden of proof under which the plaintiff rested.

"As to the defendant's alleged negligence the proofs are equally defective.

"If the deceased came to his death by reason of defendant's negligence, it rests upon the alleged absence of the bulwark rail over the gangway opening.

"Without going into details, we think there was a failure to show that the bulwark rail was not provided by the defendant, or, if not furnished, that it was essential in addition to the iron doors supplied to close the gangway at all times when cargo was not being received or discharged.

"If the deceased came to his death by reason of the iron doors being left open on the night of the accident, then it was the negligence of a co-servant which led to the result.

"It was the duty of the master, or the mate, or some officer of the ship to see that these gangway doors were properly closed and secured at night. The failure to perform this duty is negligence for which the owner of the ship is not liable. (*Benson v. Goodwin*, 147 Mass. 238; *Rogers v. Ludlow Mfg. Co.*, 144 id. 198; *The City of Alexandria*, 17 Fed. Rep. 390.)

"The evidence in the case at bar tended to show that if any one was negligent in leaving the iron doors open it was the

that the defendant knew that plaintiff proved the interest independent of the issue and that it was the defendant's duty to show affirmatively that it had valid reasons to suppose so was the result.

"We do not think the evidence would sustain a finding by the jury that the issue was independent or that the defendant was chargeable with knowledge of the fact.

"The judgment and order should be affirmed with costs."

*George H. Sherman* for appellant.

*Robert P. Turner* for respondent.

*Edmund A. Smith* for appellant.

*John Brown*.

*Edmund A. Smith*.

**SMITH & CO. v. TOWN OF GREENWICH, etc., Appellants, v. The  
TOWN OF GREENWICH, Respondent.**

(Argued April 22 1895. Decided April 30 1895.)

*Motion for a reargument.*

The following is the opinion in full:

"A motion for a reargument is made in this case accompanied with elaborate explanations entirely immaterial to the legal question decided, and of consequence only to a wrong view of the opinion rendered. The point involved and decided was wholly one of pleading. We held, in affirmance of the courts below, that the cause of action pleaded as one and single was upon an implied contract to pay the interest upon a loan to the town; that to such cause of action the Statute of Limitations was a complete and perfect defense; that the demurrer was, therefore, properly overruled and judgment for the defendant inevitable unless barred by some other possible proceedings of which the record gave no knowledge. I urged as reasons for that construction the form and character of the complaint itself, pointing out that it followed closely the essential facts needed to sustain an action on an implied contract as dis-

closed in the *Hoag* case and unessential to an action on the bonds themselves; that two distinct classes or groups of bonds creating distinct grounds of action were enveloped in the complaint, and which were those issued illegally in form before the amendment of the statute, and those issued without defect thereafter; that an action on an implied contract would justify a single action on both classes while an action on the bonds would not; and that on the hearing an offer was made by the defendant, concurred in by the court, that if plaintiff would stipulate to stand on his bonds alone or upon a cause of action to which the pleaded Statute of Limitations was no defense the demurrer should be sustained and the trial proceed, but the plaintiff refused. I have not the least doubt on that state of the case that the judgment rendered was correct. To have denied the defendant the protection of his plea would have been almost inexcusable. That is all there is of the question presented and of the decision made, and the sole pertinent commentary upon it contained in the moving papers, outside of a persistent claim that the complaint was not ambiguous, although two different constructions have been clashing along the whole line of trial and appeal, appears to be that the assertion of defendant's brief as to what occurred in the offer of a stipulation *was* denied on the argument. I took more than usual pains to be sure of the fact asserted, but it is not necessary or seemly to dispute about that, for on this motion the affidavit of the counsel who tried the case for the plaintiff is produced which shows that the offer *was* made and that the court *did* approve it. It is added that the offer required a withdrawal from the complaint of the allegations that the money was actually loaned to the town and that the commissioners intended to act within their powers, and for that reason was refused. The very reason assumes a purpose in some manner and in some way to rely upon something else or other than the coupons as partaking of the nature of valid bonds, and neither the court nor the counsel were bound to speculate upon the chances of an undisclosed purpose.

"Beyond what is pertinent to the question decided come suggestions entirely outside of it, founded upon so much of the

opinion as intimated a possibility, consistent with the record, that the hearing had proceeded beyond the mere issue of law. The judgment in terms recited that it was 'upon the merits.' The plaintiff might have withdrawn his demurrer upon the usual terms, and I think should have done so, or divided his complaint into its two possible causes of action with the assent of the defendant or of the court, in either of which cases the merits would have been reached. In view of that possibility I said: first, that there were no findings or exceptions appropriate to its review, and, second, that the only alleged error brought to our notice was the ruling on the demurrer, and that as the case stood the inevitable inference was that the plaintiff perilled his whole action on the demurrer. In other words, that if the complaint had been by consent or otherwise divided into its two causes of action the plea fatal to one was not necessarily so as to the other, and the issues joined could have been tried, the plaintiff seeking to prove his bonds and the defendant to invalidate them, but that, while that possibility existed, the inevitable inference was that the judgment rested upon the decision of the demurrer. That inference is conceded to be correct, and all the statements of what we erroneously believed as to other proceedings or other possible reasons for the judgment are without the least foundation. Our suggestion of what the plaintiff might have done and I think should have done is turned into a belief that it was done, and into a ground of the decision in the face of the explicit statement that we knew nothing about it, and that the inevitable inference from the record was that the judgment stood wholly upon the demurrer. So treating it, and it is conceded that we should have done so, we held that the demurrer was properly overruled and the judgment correct. Occasionally where a party fails for reasons connected with the practice adopted we feel a sympathy which leads to an effort for his relief, but we need not indulge any where, without surprise or inadvertence, but with a view of gaining an advantage, there has been an apparent effort to rely on the bonds to cut off the statute and then on an implied contract to remedy defects in the bonds. The coupons sued on matured in 1873, and had been due for almost twenty years when this action was

brought. The allegation of the complaint is that they were found among the papers of Culver after his death, and that he had possession as owner, and that is all that is asserted as to his title. The bonds themselves have been paid with interest while the coupons in suit have been left unclaimed. We have no such impression of the justice of the demand as to make us grant some favor which is not even asked.

"The motion should be denied, with ten dollars costs and disbursements."

*Brainard Tolles* for motion.

*C. C. Van Kirk* opposed.

FINCH, J., reads for denial of motion.

All concur.

Motion denied. \_\_\_\_\_

JAMES L. LOWRY, as Executor, etc., Appellant, *v.* EDWARD J. WOOLSEY, Impleaded, etc., Respondent.\*

(Argued April 17, 1895; decided May 8, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1894, which affirmed a judgment in favor of defendant entered upon the report of a referee.

*Alex. Thain* for appellant.

*W. W. Culver* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

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\* Reported below, 83 Hun, 257.

CATHERINE B. MARTINEAU, as Administratrix, etc., Respondent, v. ROCHESTER RAILWAY COMPANY, Appellant.\*

(Argued April 17, 1895; decided May 3, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 2, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*Charles J. Bissell* for appellant.

*Thomas Raines* for respondent.

Agree to affirm on opinion below.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

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JACOB HAUPTMANN et al., as Administrators, etc., Respondents, v. THE FIRST NATIONAL BANK OF THE CITY OF BROOKLYN, Appellant.

(Argued April 17, 1895; decided May 3, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1894, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*Joseph A. Burr, Jr.*, for appellant.

*George H. Pettit* for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

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\* Reported below, 81 Hun, 263.

ANNA E. LICK, Respondent, *v.* THE TOWN OF MORAVIA,  
Appellant.

(Submitted April 19, 1895; decided May 3, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*J. A. Wright* for appellant.

*H. Greenfield* for respondent.

Agree to affirm ; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

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ALEXANDER McANDREW, Respondent, *v.* THE LAKE SHORE  
AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

(Submitted April 23, 1895; decided May 3, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made June 23, 1893, which affirmed an order of Special Term denying a motion by defendant for leave to serve a supplemental answer.

*Charles A. Pooley* for appellant.

*Geo. E. Towne* for respondent.

Agree to dismiss appeal on authority of *Farmers' L. & T. Co. v. Bankers & Merchants' Tel. Co.* (109 N. Y. 342); no opinion.

All concur, except HAIGHT, J., not sitting.

Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*  
EDWARD HODNETT, Appellant.\*

(Argued April 22, 1895; decided May 3, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 2, 1894, which affirmed an order of Special Term denying a motion by defendant to amend the judgment in this action so that the costs therein awarded to defendant should be a charge against the county of Allegany.

*W. E. Kisselburgh, Jr.*, for appellant.

*Charles H. Brown* for respondent.

Agree to affirm on opinion below.

All concur, except HAIGHT, J., not sitting.

Order affirmed.

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In the Matter of the Application of FRANCES M. PEASLEE for  
Payment of Legacies Bequeathed to her under the Will  
of MARTHA K. PEASLEE, Deceased.†

(Argued April 22, 1895; decided May 3, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 16, 1894, which affirmed an order of the Surrogate's Court of the county of New York granting the petition herein.

*Robert Hunter McGrath, Jr.*, for appellants.

*C. N. Bovee, Jr.*, for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

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\* Reported below, 81 Hun, 137. † Reported below, 81 Hun, 597.



NOYES F. PALMER, Respondent, *v.* THE CITY OF BROOKLYN,  
Appellant.

(Argued April 22, 1895; decided May 8, 1895.)

APPEAL from order of the General Term of the City Court of Brooklyn, made January 29, 1895, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term overruling a demurrer by defendant to the complaint herein.

*H. O. Wood* for appellant.

*John P. Adams* for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. \_\_\_\_\_

THE SOLDIERS' ORPHANS' HOME OF ST. LOUIS, on Behalf of  
KANSAS PACIFIC CONSOLIDATED BONDHOLDERS, Appellant,  
*v.* RUSSELL SAGE et al., Respondents.

(Argued April 22, 1895; decided May 8, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 15, 1895, which affirmed an order of Special Term directing that the Union Pacific Railway Company be brought in and made a party to this action.

*Joseph H. Choate* for appellant.

*Winslow S. Pierce* for respondents.

Agree to affirm on opinion below.

All concur.

Order affirmed.

JOSEPH J. KITTEL, Appellant, *v.* HENRY STUEVE, Respondent.

(Submitted April 22, 1895; decided May 3, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made the first Monday of February, 1895, which affirmed an order of Special Term denying a motion to punish defendant for contempt.

*John A. Straley* for appellant.

*Frederic W. Hinrichs* for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

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In the Matter of the Appraisal of the Property of CHARLES H. EDWARDS, Deceased, under the Transfer Tax Act.

(Argued April 22, 1895; decided May 3, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made March 7, 1895, which affirmed an order of the surrogate of Kings county confirming an appraisal and assessment and imposing a tax under chapter 713, Laws of 1887.

*John H. Corwin* for appellant.

*Emmet R. Olcott* for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE PEOPLE *ex rel.* MARCUS STOWELL, as Supervisor, etc.,  
Respondent, *v.* THE BOARD OF SUPERVISORS OF THE COUNTY  
OF STEUBEN, Appellant.

(Argued April 23, 1895; decided May 21, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 2, 1894, which affirmed an order of Special Term granting an application for a writ of peremptory mandamus.

*M. Rumsey Miller* for appellant.

*John F. Parkhurst* for respondent.

Argued and decided with *People ex rel. Root v. Board of Supervisors of Steuben County* (*ante*, p. 107).

T. SCOTT THACHER, as Executor, etc., Appellant, *v.* HOPE  
CEMETERY ASSOCIATION, Respondent.\*

(Argued April 18, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 25, 1894, which affirmed a judgment in favor of defendant entered upon the report of a referee dismissing the complaint.

The following is the opinion in full:

"On the trial which resulted in the judgment now under review, the referee held that the plaintiff's entire claim was barred by the six years' Statute of Limitations, and dismissed the complaint. The question now argued by the learned counsel for the plaintiff is whether the method of computation adopted and the rule for the application of payments were correct or in accordance with the terms of the contract. The trial proceeded upon the principle that, under the decision in the case when it was here on a former appeal (126 N. Y. 510), at least a considerable portion of the claim was barred. He asked the referee to find that there became

\* Reported below, 79 Hun, 222.

due, subsequent to July 1, 1887, which was more than six years prior to the commencement of the action, the sum of \$242.49, and that this sum, with interest, was still unaffected by the Statute of Limitations. That was the amount that the plaintiff claimed to recover. It was conceded that the balance of the claim became due before that date. The referee found, at the plaintiff's request, that the principal and interest upon the face of the instrument, on July 1, 1877, was \$571.25, and that the action was commenced October 5, 1883. Of this sum, it was the plaintiff's contention that \$328.76 became due prior to July 1, 1877, and the referee was so requested to find. So that the amount in controversy at the trial was \$242.49, with interest from July 1, 1877. The referee's report is dated January 14, 1893, and on the plaintiff's contention the amount he was entitled to recover was less than \$500, exclusive of costs. That is the amount that was in controversy at the General Term. The plaintiff's counsel has presented on his brief three methods of computation, some one of which he asks us to adopt. The largest sum that remained unbarred by the Statute of Limitations, according to those figures, when the action was brought, is \$242.49, and the lowest is \$90.28. By the construction which the referee gave to the certificate and the manner in which he applied payments or receipts for lots, the whole claim was barred. We have not attempted to examine the legal questions presented by the plaintiff's counsel, since we have concluded that we have no power to entertain the appeal. The judgment is not reviewable for the reason that the amount in controversy before the referee and at the General Term was less than \$500. (*King v. Galvin*, 62 N. Y. 238; *Brown v. Sigourney*, 72 id. 122; *Davidson v. Alfaro*, 80 id. 660; *Knapp v. Deyo*, 108 id. 518; *Schenck v. Marx*, 125 id. 703.)

"The appeal must, therefore, be dismissed, with costs."

*Wesley Brown* for appellant.

*J. H. Stevens* for respondent.

O'BRIEN, J., reads for dismissal.

All concur, except HAIGHT, J., not sitting.

Appeal dismissed.

FRANCISCO WOOD, Respondent, *v.* THE TOWN OF GILBOA,  
Appellant.

(Argued April 23, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 13, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*I. H. Maynard* for appellant.

*H. Krum* for respondent.

Agree to affirm; no opinion.

All concur, except GRAY, J., dissenting.

Judgment affirmed.

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FRANCISCO WOOD, Respondent, *v.* THE TOWN OF GILBOA,  
Appellant.

(Argued April 23, 1895; decided May 21, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 13, 1894, which affirmed an order of Special Term denying a motion for a new trial.

*I. H. Maynard* for appellant.

*H. Krum* for respondent.

Agree to affirm; no opinion.

All concur, except GRAY, J., dissenting.

Order affirmed.

THE BOARD OF EDUCATION, ETC., of Waterford, Appellant, *v.*  
THE FIRST NATIONAL BANK of Richfield Springs, Appel-  
lant et al., Respondents.

(Argued April 24, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 8, 1893, which affirmed a judgment in favor of defendant Alexander G. Cunningham, entered upon a decision of the court on trial at Special Term.

*J. W. Houghton* and *James W. Verbeck* for appellant.

*G. B. Wellington* for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

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CHARLES C. CLEVELAND, Appellant, *v.* THE TOWN OF PITTS-  
FORD, Respondent.

(Argued April 25, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 3, 1893, which denied a motion by plaintiff for a new trial, and ordered judgment in favor of defendant upon decision of the court on trial at Circuit dismissing the complaint.

*George F. Slocum* for appellant.

*George F. Yeoman* for respondent.

Agree to affirm; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

In the Matter of Proving the Alleged Last Will and Testament of SAMUEL WESTERN, Deceased.

(Argued April 26, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 8, 1894, which affirmed a judgment rejecting probate of the alleged will of Samuel Western, deceased, entered upon a verdict of a jury rendered upon issues framed by the General Term upon an appeal from a judgment entered upon a decree of the surrogate of Warren county, admitting said will to probate, and also affirmed an order denying a motion for a new trial.

*C. H. Sturges* for appellant.

*John C. Keeler* for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THOMAS F. BROWN, Appellant, v. ANNIE BROWN, Individually, etc., Respondent.\*

(Argued April 26, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 11, 1894, which reversed a final judgment in favor of plaintiff entered upon the report of a referee, and also affirmed an interlocutory judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

*Horace Secor, Jr.*, for appellant.

*John F. Clarke* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

\* Reported below, 83 Hun, 160.

RUTGERS FEMALE COLLEGE OF THE CITY OF NEW YORK,  
Appellant, *v.* CORNELIUS H. TALLMAN, as Executor, etc.,  
Respondent.\*

(Argued April 30, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 16, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

*Albert Stickney* for appellant.

*W. H. Newman* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. \_\_\_\_\_

MARY BURNS, as Administratrix, etc., Appellant, *v.* EDWARD  
A. MATTHEWS, Respondent.

(Argued May 1, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 20, 1894, which affirmed a judgment in favor of defendant entered upon an order of the court on trial at Circuit non-suiting the plaintiff, and also affirmed an order denying a motion for a new trial.

The following is the opinion in full:

"This action was brought to recover damages for negligently causing the death of William Burns, the plaintiff's intestate.

"The accident occurred on the 24th day of June, 1892, by the caving in of the walls of a trench which Burns was digging for a sewer. The only negligence charged against the defendant is in failing to warn Burns not to work at the particular place in the trench where he received his injury.

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\* Reported below, 82 Hun, 20.



"The circumstances are substantially as follows : Matthews, the defendant, was engaged in constructing a sewer through Murray street in the city of Binghamton. James Pethcal was his foreman in charge of the work. The trench had been excavated and curbed from the mouth of the sewer north to a point where there was a manhole. Just north of the manhole the trench had been excavated to a depth of from eight to ten feet. The foreman then gave direction to the men not to dig it deeper until it was curbed, and, at the same time, gave direction to the men who were engaged in that kind of work to curb the trench at that place. From that point north the trench had been partially excavated for a distance of fifty feet, varying from eight to one foot in depth until it approached the surface. Shortly after giving the order for the men to quit digging a heavy shower came up and all of the workmen upon the sewer quit work for the remainder of the day. The next morning at seven o'clock the workmen, about fifty in number, assembled at the tool box, which stood near the manhole, Burns with the rest. It was his first engagement upon this sewer. He had previously been in the employ of the defendant at work upon another sewer, and, having completed his work there, was transferred to this. The foreman at the hour named gave a general order to the men to go to work and each man started, selecting his own place in the trench in which to work. Burns and two others went north of the manhole and took positions in the trench and commenced work, Burns at the place where the men the day before had been ordered to quit work until the curbing was placed. The evidence further tends to show that the foreman, at the time of giving the order, instructed the curbers to get their tools and curb the trench at that place, and that they started to obey this instruction ; that the foreman then started down to the south end of the trench to take the names and time of the men, and whilst so engaged, and within a very few minutes thereafter, the accident occurred. There was one witness who testified that when he first saw the foreman he was standing by the manhole ; that the witness saw Burns after he went to work ; that the foreman stood right by the manhole where Burns was working. Upon his cross-examina-

tion, however, he testified that the foreman was a couple of hundred feet south. He does not distinctly state that the foreman saw Burns go to work in the trench. All of the other evidence on behalf of the plaintiff tends to show that the foreman immediately started south after giving the directions referred to, and we are of the opinion that the evidence fairly construed is to the effect that the foreman did not see or know that Burns commenced work in the trench at the point of the accident. It further appears that the foreman entered the trench at the point in question before the men were set at work; that he took some tools out that were left therein, and that he saw no indications of weakness in the walls of the trench; that their practice was to curb as soon as the trench was from eight to ten feet deep, and that all of the trench had been curbed south of the manhole.

“Had the foreman known that the walls of the trench were likely to give away it doubtless would have been his duty to have warned Burns, but masters are not insurers against accidents and they ought not to have extraordinary and unexpected burdens imposed upon them. They are required to be careful and prudent, and to exercise the care and caution over the men in their employ that careful and prudent men ordinarily exercise. A foreman, having fifty men under him, cannot be expected to keep his eye constantly upon every man and see that he does not step into a place of danger, nor can he, having the care of so many, be expected momentarily to think of every danger that may befall them. Each man is expected to have some judgment and care with reference to the preservation of himself from danger, and of necessity much has to be left to his care in this regard. Burns was not set at work upon a dangerous machine about which he had no knowledge, but instead he was directed to dig a trench for a sewer. He had done such work before, and so far as appears was a man of reasonable intelligence and must have known something of the dangers of working in deep trenches without curbing. He was at liberty to select his own place to work in the trench and he might have commenced where it was but a foot deep. He knew that curbing had been put in

up to the manhole and that it must have been the intention of the foreman to curb north therefrom.

"Under the circumstances we are inclined to the view that it would not be just to charge the foreman with negligence in failing to warn the deceased, and that his death resulted from his own want of care.

"The judgment should be affirmed."

*S. Mack Smith* for appellant.

*Edmund O'Connor* for respondent.

HAIGHT, J., reads for affirmance.

All concur, except BARTLETT, J., who dissents on the ground that Pethcal, the foreman, represented the defendant, the master, in such duties as the latter owed deceased for his safety and protection; that there was a conflict of evidence as to whether the master discharged those duties and the plaintiff was entitled to go to the jury.

Judgment affirmed.

In the Matter of the Trusts Created in the Will of ALLEN  
AYRAULT, Deceased.\*

(Argued May 2, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 20, 1894, which affirmed a decree of the Surrogate's Court of Livingston county dismissing an application to compel Charles P. Bowditch, trustee under the will of Allen Ayrault, deceased, to account.

*Ernest F. Ayrault* for appellant.

*John G. Milburn* for respondent.

Agree to affirm on opinion below.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

\* Reported below, 81 Hun, 107.

ELIZABETH BLAZY, Respondent, v. HECTOR McLEAN,  
Appellant.

(Argued May 3, 1895; decided May 21, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 12, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The following is the opinion in full:

"This action was brought to compel the defendant to re-convey to the plaintiff certain real estate and to recover the value of the use thereof. Upon the first trial the plaintiff recovered judgment in her favor, which was affirmed at the General Term; but, upon appeal to this court, it was reversed and a new trial was ordered of the issues. (129 N. Y. 44.) When the case was then before us, we felt compelled to order a new trial, because of the rejection of relevant evidence which had been offered by the defendant upon the trial. The question presented was whether a deed, absolute in form, was delivered by this plaintiff to the defendant only as collateral security for the payment of a sum of \$2,000, agreed to be paid to the defendant by the plaintiff's husband and another, upon a contract for the purchase of a farm. The finding in the case was that the deed had been given as a collateral security and we said that there was no error in the finding. But the defendant had not been allowed permission to prove that the deed was delivered by the plaintiff and accepted by him as a complete and absolute transfer of the lot and for which he had agreed to allow \$2,000 as a payment upon her husband's contract. We held that, under the pleadings and the issues between the parties, there could be no lawful objection to that evidence; which did not contradict or vary the written contract, but only showed performance. In other words, the agreement of the parties contracting to purchase the farm being to pay \$2,000 before the conveyance should be made and the plaintiff's deed being given as security for their performance of that agreement, the proof offered to be made by

the defendant simply went to show the immediate payment of the money through the acceptance of the plaintiff's conveyance at that figure. Upon the new trial of the action the only evidence, which differed from that upon the first trial, was that which was given by the defendant under the offer which he had previously made and which had been rejected. The referee, before whom this trial was had, again, has decided in favor of the plaintiff and the General Term has affirmed the judgment entered upon his report. In my opinion, there is not the slightest reason for disturbing that judgment. The referee was not only justified in inferring from, and in finding upon, the whole evidence that the plaintiff's deed was not given by her, nor accepted by defendant, as an absolute deed; but even upon the evidence given by, or on behalf of, the defendant, I do not see that he could have decided otherwise. The defendant's own evidence was very insufficiently corroborated, as to the execution and delivery of the deed, and it was distinctly contradicted by several witnesses. Nor was the action tried upon the theory of fraud, as the appellant claims; but, simply, upon the allegations of the plaintiff that her deed was delivered as collateral security for the performance of the main contract and, as that had been rescinded by the parties, that she was entitled to a re-conveyance of the premises deeded by her.

"While it is true that there is but little merit in the defendant's appeal, I do not think that it is a case where we should exercise our discretion in awarding damages by way of costs, upon our affirmance of the judgment. The new trial was awarded to the defendant as a matter of legal right, for the error committed in rejecting evidence pertinent to the issues; and while I agree with the court below that the evidence, which defendant gave upon the new trial, fell far short of substantiating his offer of proof, the circumstances are such as to make the ordinary costs sufficient. There has actually been no delay caused by the defendant in the procedure of the cause to this court, whatever it has been in reaching a final determination of the issue.

"The judgment should be affirmed, with costs."

*Cassius C. Davy* for appellant.

*E. W. Gardner* for respondent.

GRAY, J., reads for affirmance.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*  
RICHARD LEACH, Appellant.

(Argued May 21, 1895; decided June 4, 1895.)

APPEAL from judgment of the Court of Oyer and Terminer of the city and county of New York, entered upon a verdict rendered January 22, 1895, convicting the defendant of the crime of murder in the first degree.

The following is the opinion in full:

"The defendant was charged in the indictment with having murdered one Mary H. Leach, whose real name was Mary Hope Newkirk, by cutting and stabbing her in the neck with a knife, on the 18th day of November, 1894. Being tried upon the indictment, in the Court of Oyer and Terminer held in and for the city and county of New York, he was found guilty by the verdict of a jury of the crime of murder in the first degree; and thereupon he was sentenced to be executed. From the judgment of conviction the defendant has appealed to this court.

"There were no exceptions taken to the rulings of the court during the trial, and the only point which has been urged upon our attention by his counsel is an exception to that portion of the charge to the jury wherein the trial judge, as he says, marshalled the evidence against the defendant. A review of the evidence satisfies us that the verdict of the jury was well supported and was the only one which fair and reasonable minds could reach. The defendant was a man of about thirty-two years of age at the time of the killing and had been living with the deceased, in illicit relations, in an apartment at No. 412 West 49th street in the city of New York.

On the evening of November 17th, 1894, they were in the rooms of some friends in the same building. A quarrel seems to have sprung up between them, because of some jealousy on her part, occasioned by his manner towards another woman who was present. In consequence, they left and returned to their own apartment. About two o'clock in the morning of November 18th, the defendant walked into the station house of the 22d police precinct, only part dressed and carrying his shoes in his hands. There was a cut on the left side of his neck and more or less blood was upon his clothes and person. According to the testimony of the captain and sergeant of the police and of the doorman of the station house, the defendant stated to each that he had killed the deceased; first mentioning her as his wife and then stating that he was not married to her. He told the captain where he would find the deceased. He said to the sergeant and to the doorman that he had sat by the side of the woman until she was dead. To the doorman he said that over an hour had passed since he had killed her and, when asked with what he had cut himself and his wife, he produced from his pocket a knife, with an open and blood-stained blade. Upon going to the apartment of the defendant, the body of the deceased was found upon the bed, entirely naked, except that the lower part was covered by a bed coverlet. The body lay upon its right side and upon the edge of the bed and a handkerchief was clinched in the left hand. Upon the left side of her neck was a deep, long and incised wound about four and one-half inches in length, ragged upon its edges, which commenced from behind the ear and varied in depth; presenting the appearance of several wounds merged into one. The jugular vein had been severed by the cut and death had been caused by the resulting hemorrhage. Blood covered the left side of the bed, pillow slips, bed cover and much of the floor. There was no evidence of any struggle having taken place in the room. There were found a slate and a sheet of paper upon the table in the sitting room of the apartments, upon which the defendant had written in an incoherent and illiterate manner. The contents are not material, nor of a

nature to be recited. He stated his 'love was dead;' that he was 'almost dead' and that she had been 'raped by her uncle.' The uncle was charged with being the cause and with having long abused the deceased. The other statements read like the maudlin ravings of a drunken man; with some possible notion of throwing the blame for the act upon the conduct of the uncle of the deceased.

"The defendant was examined as a witness in his own behalf and according to his testimony the deceased had committed suicide while affected by whiskey, which she had drunk to excess, after returning to their apartment, and also by his threat to leave her because of her habits. He testified that, upon discovering that the deceased had killed herself in the adjoining room, he endeavored to take his own life and that while in a dazed condition he had gone to the police station. He explained that he did not send for a doctor, because he found her dead and 'for the reason that he would give himself away' because he had been 'harsh' to her. He denied remembering having told the police officers that he had killed the woman. He testified that the deceased had made previous attempts to commit suicide; that she had admitted having had continuous illicit relations with her uncle and had been intimate with another man and that, notwithstanding this knowledge, he continued to live with her.

"Sufficient of the evidence has been referred to. The facts are not disputed as to the quarrel, the death and that the defendant's knife had caused the wound. The conflict was as to the mode in which death came to the woman and which the accused stated to have been by the woman's own hand and a further conflict was in his denial that he remembered his admissions to the officers. That conflict in the evidence was for the jury to determine. They were to pass upon all the circumstances of the case and the degree of credibility which they should attach to the defendant's story. If they believed the evidence for the prosecution, the deceased had been killed by the defendant as the result of a quarrel, which took place between them in the evening. That evidence showed, or tended to show, that the defendant had stabbed the deceased in the neck with his knife and the nature of the



wound and of the weapon was such as to justify the inference that the stabbing had been deliberately done and with the design to effect her death. Many facts combined to render incredible the story of the defendant. There was the writing found upon the slate and sheet of paper, in which he speaks of her death and yet does not suggest that she had committed suicide; which would have been a most natural statement to make, especially as he attempted, or pretended to attempt, it himself. When at the station house and in the hospital, where he was for nearly three weeks, while receiving medical care for his wound, and when taken thence to the Police Court to answer to the charge, he makes no statement that the deceased had killed herself. Nor does he make it to any person, until his attorney was preparing for his trial. Had such been the fact, it is inconceivable that he should not have stated it, either when he went to the station house to tell of the occurrence, or at some time before he confided it to his attorney. It was the defendant's knife which had caused the wound upon the deceased and the situation of the wound itself, as well as the nudity and the position of the body of the deceased, were circumstances which militated against the probability of the wound having been self-inflicted and with suicidal intent.

"Without commenting further upon the evidence, it is sufficient to say that the inference drawn by the jury from it, of the defendant's having deliberately murdered the deceased, was just and reasonable.

"The criticism upon the charge of the learned trial judge is, not that he had improperly stated the facts but, to quote the language of the defendant's counsel, 'that the evidence was marshalled a little against the defendant, the way the evidence was put together.' When the defendant's counsel, upon the close of the charge, had excepted to that portion which consisted of the marshalling of the evidence, the trial judge asked him to point out any fact that was improperly stated, in order that he might correct it, saying, 'if I have improperly stated any fact I wish to correct it.' In response to the remark of the defendant's counsel that the evidence was 'marshalled' against the defendant, the trial judge replied,

and these remarks, although not the subject of an exception, have been pressed upon our consideration as having prejudiced the minds of the jurors and as disabling them, as the expression of an opinion by the trial judge, from reaching a fair verdict, 'if the facts are against the defendant, that is not my fault; it is unfortunate but I cannot help it.' The charge was a clear, logical and fair statement of the facts in evidence before the jury; and they were instructed that it was for them to find from those facts whether or not the defendant was guilty. They were cautioned against being influenced by the opinion of the court and were admonished that it was for them to draw the conclusions from the evidence. It was the duty of the trial judge to present the evidence to the jury and that would have been unintelligently done, if he had not presented them in what seemed their logical order, or in the natural sequence of events. That he should have commented upon the evidence, and, perhaps in some expressions, have indicated the bent of his own mind, is not a subject for adverse criticism, so long as he did not invade the province of the jury and withdraw from them the consideration of any facts, or lead them to suppose that their determination was not wholly with them. For the trial judge, therefore, to answer the criticism of the defendant's counsel as he did was natural and quite unobjectionable. The whole case, as made by the evidence given in behalf of the prosecution and of the defendant, is bare of any fact or feature to raise it above the level of a vulgar crime, committed as the result of a drunken brawl. That the defendant may have been influenced to the commission of his atrocious crime by resentment at the woman's habits of drunkenness and immorality, does not tend to relieve the case of its brutal features. He had continued to live with her as his mistress, after receiving her confessions of continuous illicit relations with her uncle. It would be difficult to have arrayed the facts in evidence in any way before the jury, without their suggesting by their own force the willful commission of a disgusting and brutal crime; for the commission of which there were shown to have been sev-

eral motives and the opportunity, and where all the circumstances pointed to the defendant's guilt.

"We see no occasion to interfere with the execution of the judgment of death. The defendant has had a fair trial and has been convicted upon evidence which should satisfy the fairest mind as to his guilt. The judgment appealed from by him should be affirmed."

*Hugh O. Pentecost* for appellant.

*John D. Lindsay* for respondent.

GRAY, J., reads for affirmance.

All concur.

Judgment affirmed. \_\_\_\_\_

JAMES HEDGES, Respondent, *v.* WILLIAM H. PAYNE,  
Impleaded, etc., Appellant.\*

(Argued May 20, 1895; decided June 4, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 4, 1895, which reversed an order of Special Term granting a supersedeas and denied a motion by the defendant, William H. Payne, to be relieved from imprisonment under an order of arrest obtained by the plaintiff and from arrest under any execution issued in the above-entitled action.

*Arthur H. Smith* for appellant.

*Henry E. Howland* for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

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\* Reported below, 85 Hun, 877.

LAURA STEVEN, Respondent, *v.* JOHN B. LORD, as Executor,  
etc., Appellant.\*

(Argued May 21, 1895; decided June 4, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1895, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*Thenford Woodhull* for appellant.

*Jasper W. Gilbert* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. \_\_\_\_\_

RICHARD BISHOP, as Administrator, etc., Appellant, *v.* HELEN  
E. HENDRICK, Respondent.†

(Argued May 23, 1895; decided June 11, 1895.)

APPEAL from orders of the General Term of the Supreme Court in the third judicial department, made December 4, 1894, one of which modified and affirmed, as modified, an order of Special Term overruling and sustaining certain exceptions to the report of a referee and modifying and confirming said report, and the other of which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*John C. Keeler* for appellant.

*D. G. Griffin* for respondent.

Agree to affirm on opinion below.

All concur.

Orders affirmed.

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\* Reported below, 84 Hun, 353. † Reported below, 82 Hun, 323.

JOSEPH BLUMENTHAL, as Receiver, etc., Respondent, *v.* BENJAMIN F. EINSTEIN et al., as Trustees, etc., Appellants.\*

(Argued May 24, 1895; decided June 11, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 16, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

*A. R. Dyett* for appellants.

*William Man* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. \_\_\_\_\_

In the Matter of the Probate of the Last Will and Testament of WILLIAM V. CLARK, Deceased.

(Argued May 24, 1895; decided June 11, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 4, 1894, which affirmed a decree of the surrogate of Saratoga county confirming probate of the last will and testament of William V. Clark, deceased, and revoking probate of a codicil thereto dated December 17, 1889.

*John Foley* for appellants.

*J. S. L'Amoreaux* for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

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\* Reported below, 81 Hun, 415.

JOHN DYE, Respondent, *v.* THE DELAWARE, LACKAWANNA  
AND WESTERN RAILROAD COMPANY, Appellant.

(Argued May 29, 1895; decided June 11, 1895.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made May 8, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*Louis L. Babcock* for appellant.

*H. J. Swift* for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. \_\_\_\_\_

MARY M. WHITE, as Administratrix, etc., Respondent, *v.* THE  
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COM-  
PANY, Appellant.

(Argued May 29, 1895; decided June 11, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial dapartment, entered upon an order made May 24, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

*D. C. Robinson* for appellant.

*Frederick Collin* for respondent.

Agree to affirm ; no opinion. .

All concur.

Judgment affirmed.

EDITH MASON FAXON, Respondent, v. JOHN MASON et al.,  
Appellants.

(Argued June 8, 1895; decided June 14, 1895.)

MOTION to dismiss appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 28, 1894, which modified and affirmed, as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*W. B. Hornblower* for motion.

*Franklin Bien* opposed.

Agree to dismiss appeal, without costs, unless defendant John Mason shall cause to be executed the proper undertaking on appeal to this court within ten days from service of a copy of this order upon his attorney of record.

All concur.

Ordered accordingly. \_\_\_\_\_

PEOPLE ex rel. GEORGE SWEeley, Appellant, v. OREN E.  
WILSON et al. (as Police Commissioners, etc.), Respondents.

(Argued June 8, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 14, 1895, which affirmed an order of the Special Term denying a motion for a writ of mandamus.

*James W. Eaton* for appellant.

*William P. Rudd* for respondents.

Agree to affirm; no opinion.

All concur, except HAIGHT, J., not voting.

Order affirmed.

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AUGUST WUENSCH, Respondent, *v.* ALBERT PULITZER, as  
President, etc., Appellant.

(Argued June 3, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 15, 1895, which affirmed an order of Special Term granting a motion by plaintiff to amend the summons and complaint in the action above entitled.

*C. J. Shearn* for appellant.

*Julius Lehman* for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. \_\_\_\_\_

WILLIAM J. MADDEN, Respondent, *v.* THE EQUITABLE LIFE  
ASSURANCE SOCIETY OF THE UNITED STATES, Appellant.\*

(Argued June 3, 1895; decided June 14, 1895.)

APPEAL from interlocutory judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 9, 1895, which affirmed an order of Special Term overruling a demurrer to the complaint.

*Charles C. Deming* for appellant.

*Samuel Wyman Smith* for respondent.

Agree to affirm on opinion below, with costs, with leave to defendant to answer within twenty days after service of a copy of the order entered upon the remittitur.

All concur.

Ordered accordingly.

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\* Reported below, 11 Misc. Rep. 540.



DAVID BOYD, Individually and as Administrator, etc.,  
Respondent, v. ROBERT BOYD et al., Impleaded, etc.,  
Appellants.

(Argued June 8, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made the first Monday of April, 1895, which affirmed an order of Special Term denying a motion by defendants to strike the above-entitled cause from the calendar, etc.

*Henry Daily, Jr.*, for appellants.

*Edward W. S. Johnston* for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. \_\_\_\_\_

ROBERT BOYD, Respondent, v. DAVID BOYD, Individually and  
as Administrator, etc., et al., Appellants.

(Argued June 8, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made the first Monday of May, 1895, which affirmed an order of Special Term amending the final decision in this action.

*Edward W. S. Johnston* for appellants.

*Henry Daily, Jr.*, for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

PEOPLE ex rel. HARRY P. PIKE et al., as Trustees, etc., et al.,  
Appellants, v. EDWARD P. BARKER et al., as Commissioners,  
etc., Respondents.

(Argued June 3, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 20, 1895, which affirmed an order of Special Term dismissing a writ of certiorari to review an assessment of personal property.

*Lucien B. Chase* for appellants.

*George S. Coleman* for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed. \_\_\_\_\_

PEOPLE ex rel. ALSON B. OSTRANDER, Appellant, v. LEVI P.  
MORTON et al., as Trustees, etc., Respondents.\*

(Argued June 3, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 14, 1895, which affirmed an order of Special Term denying an application by the relator for a writ of mandamus.

*Robert H. McCormic, Jr.*, for appellant.

*Henry C. Nevitt* for respondents.

Agree to affirm on opinion below.

All concur.

Order affirmed.

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\* Reported below, 12 Misc. Rep. 476.

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CALEB G. COLLINS, Respondent, *v.* HORACE F. BURROUGHS,  
Appellant.

(Argued June 3, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made March 5, 1895, which affirmed an order of Special Term denying a motion by defendant for an order of reference.

*James M. Hunt* for appellant.

*B. E. Valentine* for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. \_\_\_\_\_

SALVATORE CANTONI, Respondent, *v.* ELSA FORSTER,  
Appellant.

(Argued June 4, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made May 17, 1895, which affirmed an order of Special Term continuing *pendente lite* an injunction.

*Samuel H. Randall* for appellant.

*Louis Edwin Bomeisler* for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. \_\_\_\_\_

SALVATORE CANTONI, Respondent, *v.* ELSA FORSTER,  
Appellant.

(Argued June 4, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made March 19, 1895, which affirmed an order of Special Term denying a motion to submit issues of fact to the jury.

*Samuel H. Randall* for appellant.

*Louis Edwin Bomeisler* for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed. \_\_\_\_\_

ADOLPH LADENBURG et al., Appellants, v. COMMERCIAL BANK  
OF NEWFOUNDLAND et al., Respondents.

(Argued June 4, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 17, 1895, which reversed an order of Special Term denying a motion to set aside an attachment, and granted such motion.

*E. H. Benn* for appellants.

*John A. Mapes* for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed. \_\_\_\_\_

PEOPLE ex rel. THE ARGUS COMPANY, Respondent, v. JOHN  
PALMER, as Secretary of State, et al., Appellants.

(Argued June 4, 1895; decided June 14, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 28, 1895, which affirmed an order of Special Term, directing a writ of mandamus to issue.

*William E. Kisselburgh, Jr.*, for appellants.

*Amasa J. Parker, Jr.*, for respondent.

Agree to affirm on opinion of Special Term.

All concur.

Order affirmed.

SUSAN B. ANTHONY et al., Respondents, v. THE AMERICAN  
GLUCOSE COMPANY, Appellant.

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A new corporation having been organized by the transfer to it of the property and business of certain original corporations, upon an agreement between the corporators of all of them that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new corporation not reserved for the use of the treasury, certain stockholders in one of the original corporations brought an action against the new corporation for a delivery of its stock to them. *Held*, that the action was maintainable against the new corporation, and that such stockholders were not to be turned over for relief to their own original corporation after by agreement all its functions had ceased, although it might not be wholly dead — it appearing that the new corporation owed a contract duty directly to the individual corporators and not to their corporate entities.

(Argued June 13, 1894; re-argument ordered November 2, 1894; re-argued May 1, 1895; decided June 14, 1895.)

APPEAL from an order of the General Term of the Supreme Court in the fifth judicial department, made January 18, 1893, which reversed a judgment entered upon the report of a referee dismissing the complaint upon the merits, and which granted a new trial.

This action was brought to compel the defendant to issue \$12,500 of its capital stock to the plaintiffs, Susan B. Anthony and Mary S. Anthony, and to account for and pay over to the plaintiffs the dividends which had been declared thereon since the year 1883, together with other earnings properly distributable upon the plaintiffs' stock.

The referee decided that the remedy of the plaintiffs was not to be sought in an action against the defendant, but in an action against the Leavenworth Sugar Company to compel it to turn over to the plaintiffs their proportionate share of the capital stock of the defendant claimed to have been received by the Leavenworth Sugar Company under the agreement hereafter mentioned, together with other earnings properly distributable upon the plaintiffs' stock, though not declared as dividends.

On and prior to the 21st day of February, 1883, the plaintiffs were the holders of forty shares of the capital stock of

the Leavenworth Sugar Company; and, in the year 1889, by assignment from Daniel R. Anthony, they became the owners and holders of fifty other shares of such capital stock, making ninety shares in all which they now possess.

There existed on the 21st day of February, 1883, a corporation organized under the laws of New Jersey, known as the Firmenich Sugar Refining Company, having its principal office in the city of Buffalo, N. Y., and the Buffalo Grape Sugar Company, and the American Grape Sugar Company, each of which was organized under the laws of the state of New York, having, respectively, their principal business in the city of Buffalo; the Peoria Sugar Refinery, a corporation organized under the laws of Illinois, having its principal office in Peoria, Illinois, and the Leavenworth Sugar Company, organized under the laws of Kansas, having its principal office in Leavenworth, Kansas. Each of these corporations was the owner of a plant for the manufacture of glucose and grape sugar, and each of them was engaged in the business of making and selling those articles. On the 21st day of February, 1883, these five corporations entered into an agreement in writing, with the assent of all the stockholders of each of them, including the plaintiffs and their assignor, Daniel R. Anthony, for the formation of a new corporation to be organized under the laws of the state of New Jersey, to be called the American Glucose Company, with a capital stock of \$15,000,000, divided into 150,000 shares of the par value of \$100 each. That company is the defendant.

By this agreement all the real estate, buildings, engines, boilers, tools, machinery and fixtures, including everything properly covered by the description of "plant;" and all horses, mules, carts, wagons, harnesses, sleighs and the appurtenances thereof, together with all letters patent and licenses, rights, trade marks and contracts of every nature belonging to each of the parties, was to be vested in the new corporation by proper instruments, and by perfect title, by the tenth day of March of that year, or as soon thereafter as possible. The new corporation, the American Glucose Company, the defendant, was, by the terms of the agreement, vested with a perpetual license to use any processes or machinery in

use in any of the factories of the five above-mentioned corporations, whether owned by such corporations or by any stockholder thereof.

Of the capital stock of the defendant, 125,000 shares, being at par \$12,500,000, were allotted to be applied towards the acquisition of the property of the five corporations, and were to be divided as follows: 25,000 shares to the Firmenich Sugar Refining Company, and 100,000 shares to the remaining four corporations; the residue of the stock, namely, 25,000 shares, was to be retained in the treasury of the defendant.

The defendant became the purchaser in pursuance of this agreement of all of these plants, properties, rights and franchises, together with the materials and supplies, exclusive of the manufactured stock and stock in process of manufacture, of each of these five corporations at the current market value thereof. It had also the right to purchase the material in process of manufacture in each of these factories, by paying therefor at the rate of two and one-half cents per pound, reduced to finished merchantable goods, with a gravity of forty degrees Beaumé, taken at a temperature of one hundred degrees Fahrenheit; together with all manufactured merchantable goods, inclusive of starch in the starch department of the Buffalo Grape Sugar Company, at a given price. A clause was inserted providing for the contingency of opposition to this scheme by any stockholder of any of the five old companies to this arrangement; but no opposition seems ever to have been made by any of the stockholders. Provision was made for a working capital of the defendant in the sum of at least \$1,000,000, for which bonds were to be issued bearing interest at the rate of seven per cent per annum, payable semi-annually, in the sum of \$100 each, or multiples thereof, amounting in all to the sum of \$1,250,000. Payment of these bonds was secured by mortgage of the new company upon all and singular the property acquired of the old companies, or to be acquired thereafter.

The defendant assumed by this agreement all contracts theretofore made in good faith by any of the five corporations, for the sale of glucose, syrup, grape sugar, starch or feed, but

did not assume any contracts for the sale of mixed or mixing sugar, or any contract involving the testing of any patents or improvements. It also assumed any or all contracts theretofore made in good faith by any of the five corporations or by Cicero J. Hamlin, William Hamlin and Harry Hamlin, or any of them, for the services of any employee, agent or broker, in the factories of either of said corporations, or in their business.

This agreement, which contained other provisions not necessary to be recited in this connection, was consummated on the 17th day of March, 1883, by proper transfers and conveyances executed by these five corporations to the defendant, covering all property real and personal, of the character and description above mentioned; and thereupon the defendant became the absolute owner thereof.

It was shown, and the fact was found by the referee, that Cicero J. Hamlin, William Hamlin and Harry Hamlin were the owners of all the capital stock of the American Grape Sugar Company and of the Buffalo Grape Sugar Company; and of all of the stock of the Peoria Sugar Refinery, except a small portion thereof owned by one Edward F. Easton, and of all the capital stock of the Leavenworth Sugar Company, excepting a small portion thereof which was owned by F. D. Locke, and excepting also the ninety shares which were owned by the plaintiffs and their brother, Daniel R. Anthony. The whole of the capital stock of the Leavenworth Sugar Company was \$150,000, at par, in shares of \$100 each. William Hamlin was at all of these times, and for years afterwards, the secretary of the American Grape Sugar Company, and secretary and treasurer of the Buffalo Grape Sugar Company, the secretary and treasurer of the Peoria Sugar Refinery, and the secretary and treasurer of the Leavenworth Sugar Company. The Messrs. Hamlin arranged in a manner satisfactory to Locke and Easton for the number of shares of the new company which they should receive in place of those then held by them. They failed, however, to make any effective arrangement with the plaintiffs or with Daniel R. Anthony in this regard. This failure to bring about an adjustment with the Anthonys arose from the fact that the



Messrs. Hamlin insisted, as a condition of a delivery to them of their share of the defendant's stock, that the Anthonys should pay the sum of \$11,813.78, being, as was claimed by the Hamlins, an equitable proportion which their stock bore to the whole of the indebtedness of the Leavenworth Sugar Company, which, as they averred, amounted to \$196,896.48.

There was, accordingly, issued by the defendant, a certificate for the 900 shares of its capital stock in the name of Daniel R. Anthony; but it was received by William Hamlin, who refused to surrender it or any part of it to Daniel R. Anthony, who was acting for his sisters as well as for himself, except upon the conditions above mentioned. But the name of Daniel R. Anthony was entered upon the books of the defendant as one of its stockholders to this amount, and notices of subsequent dividends were from year to year sent to him as such stockholder.

Certificates of stock of the defendant were issued to the stockholders of the Firmenich Sugar Refining Company in exchange for their shares in the last-named corporation. This was done upon the certificate or statement made by the Firmenich Sugar Refining Company.

In the month of October, 1883, after a dividend of two and one-quarter per cent of the capital stock of the defendant had been declared, and notice thereof given to Anthony, payment of Anthony's share was withheld by the direction of the Messrs. Hamlin, subject to an expected settlement between them and Anthony. After the final failure of such negotiations for a settlement, the Messrs. Hamlin caused the said dividend declared upon the said certificate of stock of the defendant issued in the name of Daniel R. Anthony, to be credited to themselves in three parts, one-third each to Cicero J. Hamlin, William Hamlin and Harry Hamlin.

Subsequently the capital stock of the defendant was reduced from \$15,000,000 to \$1,500,000, notice of which was given to Anthony with a request that he authorize the cancellation of the 900 shares of the stock which stood in his name, and take in place thereof ninety shares of the reduced capital stock; but to this notice and request Anthony paid no attention. Afterwards other dividends were declared by the

defendant upon this capital stock, notices of some of which were given to Anthony, and the same have remained unpaid, and have been held in the defendant's account known as unpaid dividend account. All other stockholders of the defendant have been paid their dividends.

The Messrs. Hamlin acquired their stock and controlling interest in the Leavenworth Sugar Company on the 5th day of June, 1882, and immediately thereafter, at a meeting of the stockholders of that company, held at Leavenworth, Kansas, they caused themselves to be elected officers and directors of that company. Immediately after their election as trustees they adjourned their meeting as directors of said company in their office in Buffalo, N. Y., where a meeting was held by Cicero J. Hamlin, William Hamlin, Harry Hamlin and Franklin D. Locke, as directors of said company, on the 10th day of June, 1882, and where all the subsequent meetings of the directors of the said company were held, and where all the meetings of the said four Hamlin companies, so called, were held after the Messrs. Hamlin gained control of them. But no formal meeting of the directors of any of the four Hamlin companies has been held since the making of the agreement by the five corporations to form a new company, and the transfer of the property of said companies to said defendant in pursuance of said agreement of February 21, 1883.

The referee dismissed the complaint of the plaintiffs upon the ground that they cannot maintain this action because no contract relations of any nature exist between the defendant and any of the stockholders of the five corporations entering into the agreement for the organization of the defendant.

The following is the opinion in full:

"There are two theories of the facts of this case: one technically true but substantially an error; the other really true but formally open to criticism; and upon our choice between them will be quite certain to depend the ultimate conclusion. One theory interposes between the parties really interested and actually contracting the corporate entities of the five original companies, and behind that legal shelter seeks to protect the company in default to its stockholders and turn them over for relief to their own original company

after by agreement all its functions had ceased, although possibly it may not be altogether and hopelessly dead. The defense is not meritorious. It simply attempts to substitute circuitry of action for direct responsibility, and requires us to blind our eyes with the theoretical abstraction so as to shut out the obvious and undoubted truth. We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth, and I think we should not hesitate in this case to reject the purely technical defense attempted. For nothing is plainer than that the transfer of the property and business of the five original companies to the new company to be organized was upon an agreement between the incorporators of them all that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new company not reserved for the use of the treasury. That agreement is not denied by anybody, and every word and every act of all the companies, and of each and all of the incorporators, have proceeded upon that assumption. The companies, as corporate entities, could not alone and without the consent of their constituent members make a transfer which was intended to end their whole practical business existence, and it was agreed by such companies when they made the written contract among themselves, that the refusal of any one incorporator in any one company to give his consent to the transfer should turn the proposed sale into a mere lease. The authority of the corporations to sell and to make a valid agreement of sale to which the new company could become a party, was upon the explicit and understood condition that the new stock should be issued in exchange for the old stock to the several incorporators, and the necessary consent of the stockholders was given upon that express condition. How fully and perfectly this was understood is obvious from the fact that the offers of the new company to issue its stock to the plaintiffs were always coupled with the condition that the latter should surrender their old stock and cease to be stockholders in the old companies at the moment when they became such in the new. Anthony swears that when he gave his consent to the sale the Hamlins agreed

that he should have the one hundred and twenty-five shares that he claimed as his due proportion of the Glucose Company stock, and that he gave his consent on that basis and upon that condition. None of the Hamlins carry their denial beyond the question of amount. They dispute that, and that only. William Hamlin, in his letter of April 11, 1883, explicitly admits mailing ninety shares to Anthony as being those agreed upon between the parties. There is nowhere a word said by anybody looking to an issue of shares to the corporations instead of to their stockholders.

“Armed with this limited and conditional authority from their corporators, the companies took up their first duty, which was to agree among themselves as to the proportion of stock to be allowed to each as the gross share to which, under the existing parol agreement, their individual members in proper proportions would be entitled. For that purpose the written contract was made. It did settle the gross share of the Firmenich corporation, and the amount of stock to remain unissued, and the amount to go to the corporators of the four Hamlin companies in the lump of one hundred thousand shares, but left unsettled the gross proportion of each of the latter, and so necessarily the share of each individual corporator. The reason of this omission is evident. The Hamlins were the only stockholders in two of the companies, and almost the sole owners of stock in the other two. The only necessary distribution would be to fix the shares of Locke, Easton and Anthony, which, it was assumed, could be done by agreement, and so the gross share of the four Hamlin companies was allotted to them in one amount. Allotted is the word used in the contract instead of issued or paid. It was consistent with the fundamental and existing parol agreement among the corporators. It did not mean, in violation of that agreement and in contempt of the specific authority conferred, that the new stock should be issued to the old companies. It could not mean anything so absurd. They were powerless to surrender the stock of their shareholders in exchange, and to say that the new stock was to be issued to the shells of corporations having no stockholders to whom it could distribute it, unless to the new Glucose Company itself, which alone would possess

the surrendered certificates, is to say that the individual corporators meant to throw away and utterly waste their rights. Nothing of the kind was meant, and the word allotted was fitly used to fix the gross share of the four companies, and not to authorize, in violation of the fundamental agreement, a payment or issue to them as partners or tenants in common or in any manner whatever.

“When the Glucose Company came into existence it had made no contract and was bound by no obligation. It was free to buy out the five companies on any terms it could secure, but chose to adopt those offered by such companies and their corporators. It knew accurately what those terms were in all their details. Almost every member of the board had been a party to the arrangement and participated in framing it, and so, with full knowledge, it adopted the contract offered, completely and as a whole. It formally accepted the preliminary contract made between the companies, knowing that it vested only on condition of an issue of stock to the corporators, and in buying later the plant at Tippecanoe it formally agreed to give its stock to the persons interested. It is thus a mistake to say that the Glucose Company dealt only with the five corporations. It dealt also and necessarily with the individual corporators whose consent it required, and obtaining it on condition of payment to them, and with full knowledge of that condition, became obligated to each stockholder to issue to him his due and proportionate share of Glucose Company stock.

“If we admit that the defendant may not have been bound to decide proportions among individuals, the result is not changed. No dispute about them arose until it sprang up between the Hamlins on one side and Anthony on the other. The latter claimed 1,250 shares on the original and 125 shares on the reduced capital, as payable to him; the former insisted that only 900 shares on one basis and ninety on the other, were due to Anthony, and it is now fully conceded that the plaintiffs are entitled on a proper distribution to at least ninety shares of the stock of the new company as their due and just proportion. That question as against the Glucose Co. is settled. It is true that Anthony claimed more, but that the just propor-

tion is at least ninety shares nobody disputes or has ever disputed. It was clearly error to refuse the plaintiffs that except upon the theory that the Glucose Company came under no contract obligation to the individual stockholders. I think it did, not only by reason of the primary contract of the stockholders whose benefits it secured and took, but also because by its own conduct it has recognized and adopted that contract. It has issued its stock to every individual stockholder in all the five companies, and never to either one of the companies or by their corporate direction, for there has been since the sale no corporate action of either and its own construction of its own duty should be conclusive.

"Let us examine the defense interposed somewhat more closely.

"It is said the Glucose Company bought solely of the corporate entities, and as matter of law was bound only to pay them. That might have been. If the corporations alone could have made the contract, if the individual stockholders had no privity of contract with the Glucose Company, the contention would have been sound, at least in a court of law. But none of those conditions exist, as I have already sought to show, and the Glucose Company did owe a contract duty directly to the corporators, and stands before us claiming to have tendered full performance of that very contract duty.

"It is said that the Glucose Company issued its allotted stock to the Leavenworth Company, and that ended its contract obligations. The proof relied upon is a formal certificate, No. 11, of 99,400 shares issued to the four Hamlin companies, as partners or holders in common. It was wholly unauthorized. The companies, as I have said, had no right to a share of that stock. They never requested its issue, they never accepted it, and never had it at all. William Hamlin, secretary of the new company and of four of the old ones, all powerful and multiform, and multitudinous of office as he was, nevertheless was not the Leavenworth Company. Its board of directors never met to give a direction about the issue of stock to it, or to any one in its behalf, to accept a tenancy in common creating, possibly, an unlawful partnership, to receive payment of what was not due to it, to surrender shares it did not have, to

return a certificate of which it knew nothing, or to decide what stockholders were entitled to new stock, and in what proportions. All this, the power of William Hamlin, secretary, and as such, authorized to keep the minutes of meetings which had ended, assumed to do. He had no such authority, and the Glucose Company obeyed him at its peril.

"But certificate No. 11 was never a payment or issue of stock, effectively, at all. It was merely a temporary setting aside or allotment of shares out of which, in due season, the actual issue by way of payment was to be made to the individual corporators concededly entitled to receive that payment. Wm. Hamlin, secretary, surrendered it to Wm. Hamlin, secretary, and then told Wm. Hamlin, secretary, to whom the Hamlins directed it to be issued, which was to the Hamlins mainly, except the ninety shares. I do not mean to complain of or criticise that action. These gentlemen who so controlled their corporation practically owned it, and had an honest right to dictate, but the company must take the consequence of its obedience.

"It is said that the four companies and the Hamlins should have been made parties defendant. I do not see that the corporations have the slightest interest in this controversy. The General Term thinks them dissolved and dead. I do not go so far; but if the hollow and empty shells had life enough to stand up before the court as parties defendant, at least they had no interest in the dispute and are in no manner affected by its results.

"Nor were the Hamlins necessary parties. They have received their full shares of stock. Giving ninety shares to the plaintiffs will not affect the admitted proportions of a single stockholder, all of whom have their shares, and at least ninety are left, and there is treasury stock much beyond any amount claimed.

"That defense was suggested on the argument, and pressed as a justification for refusing a delivery to plaintiffs, and was that they ought to pay to the Hamlins about \$11,000 as their part of the burden of the debts of the Leavenworth Company.

There were such debts, but there is no finding of their amount, nor who paid them, nor that they have been paid at all, nor that the Hamlins made such payment. The debt may be wholly unpaid, or canceled in the process of consolidation, or assumed and paid by the Glucose Company out of earnings. And even if the plaintiffs are, or ought to be, bound for the payment claimed, there is neither plea, finding nor proof that it was an agreed precedent condition of plaintiffs' right to their due proportion of stock in the consolidated company, nor that any assessment had been lawfully made against the Anthonys or that there was any lien upon the stock due them.

"Equally without foundation is the contention that a certificate to the plaintiffs for ninety shares of the Glucose stock was delivered to the Leavenworth Company for them and that such company was alone in default for the withholding of the stock. There is no proof and no finding that such certificate was ever delivered to the Leavenworth Company or received or accepted by it, or that it became in any manner possessor of the stock. On the contrary, the finding is that it was delivered to William Hamlin without specifying any representative or official character. That he held it as agent of the Glucose Co. and tendered it as such agent is made certain by his letter inclosing it in which he says 'we' have just been able to issue the stock, and 'we' will change its form if necessary. 'We,' can only mean the Glucose Co. and the certificates in Hamlin's hands were still held by that company and tendered by it to the plaintiffs. And besides the certificates if they had been handed to the Leavenworth Co. were clogged with an unlawful condition which the Glucose Co. had no right whatever to impose.

"We think, therefore, that the order of the General Term was right and should be affirmed, with judgment absolute for the plaintiffs upon the stipulation. We are all of opinion, however, that under the peculiar and exceptional circumstances of the litigation, that final judgment can only be for the ninety shares and the dividends and interest thereon. The referee denied plaintiffs' right wholly. The General Term affirmed such right only as to the ninety shares and left



the balance finally defeated. We affirm that order, on the same theory, holding that plaintiffs' claim, as we sustain it, is limited to the ninety shares, and the judgment absolute must recognize what has been decided to be the plaintiffs' right.

"The order should be affirmed, with judgment absolute against the defendant on its stipulation."

*John G. Milburn* for appellant.

*John Van Voorhis* for respondents.

FINCH, J., reads for affirmance.

All concur, except GRAY and HAIGHT, JJ., not voting.

Ordered accordingly.

PROCEEDINGS  
IN THE  
COURT OF APPEALS  
IN REFERENCE TO THE DEATH OF  
HIRAM E. SICKELS  
LATE REPORTER OF THE COURT  
WHO DIED THURSDAY, JULY 4, 1895.

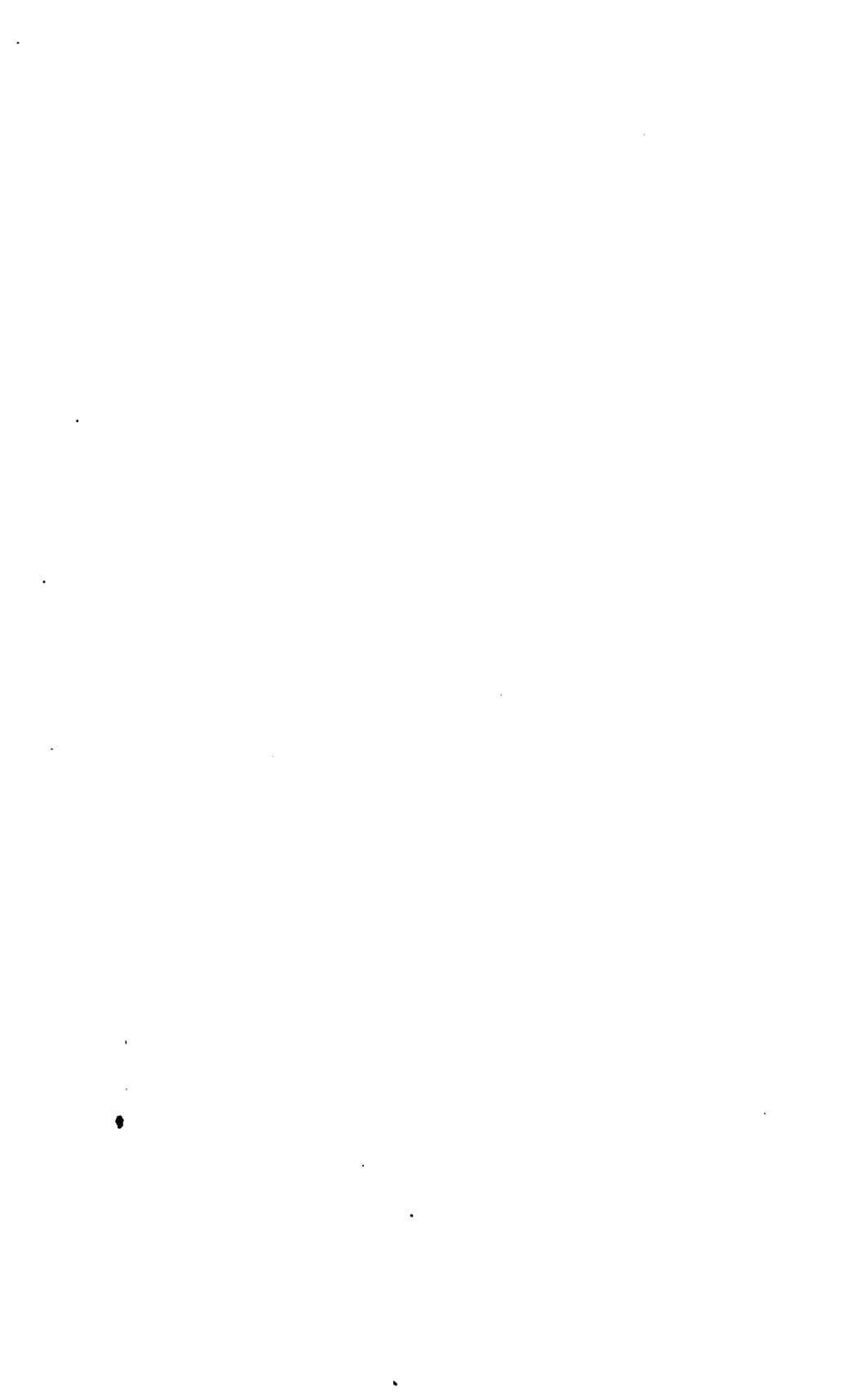
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IN COURT OF APPEALS,  
ALBANY, N. Y., *Oct. 7th*, 1895.

The Court directs an entry on the minutes of the death of Hiram E. Sickels, Esq., for more than twenty-three years the faithful reporter of this court. He became State Reporter in the year 1872, and died July 4, 1895, having nearly completed the preparation of the one hundred and first volume of his reports, the last decision in which was rendered but about three weeks before his death.

Mr. Sickels was born June 24, 1827, in the village of Albion, in this state. He received a general education at the Albion Academy, and thereafter read law in the same village. He was admitted to the bar in 1848, and immediately commenced practice in Albion, where he continued in assiduous devotion to the duties of his profession, until the breaking out of the Civil War called him to the higher duty of defending his country. In 1862 he was commissioned first lieutenant in the Seventeenth Volunteer Battery of light artillery, which he had assisted in raising, and with which he served actively in the field from Fort Fisher to Appomatox. On being mustered out, in June, 1865, he was brevetted for gallant and efficient service.

Returning to Albion, Mr. Sickels resumed the practice of law, which he continued there until 1871, when, desiring a wider field, he removed to Albany, where the remainder of his life was passed. In February, 1872, he was appointed by the Court of Appeals reporter of its opinions, which position he held without intermission until his death. His work as a reporter covers volumes 46 to 146, inclusive, of the New York Reports, being one hundred and one volumes. These volumes are his lasting monument, and evidence his learning, discrimination, accuracy and industry — qualities which preeminently fitted him for the duties he performed so long and well.



# INDEX.

## ABODE.

See RESIDENCE.

## ACCOUNTING.

See EXECUTORS AND ADMINISTRATORS.

## ACCOUNT STATED.

A cause of action upon an account stated does not rest upon the obligation originally created when the items of indebtedness arose, but upon the agreement of the parties, made after the transactions constituting the account, that a certain balance remains due from one to the other, and the promise of the former to pay this balance; and so, it is unnecessary in an action upon an account stated to set forth in the complaint the subject-matter of the original debt. *Schutz v. Morette.* 187

## ACCUMULATIONS.

1. The will of C. directed his executors to divide one-half of his estate into as many equal shares as he should leave children him surviving, to collect the interest on each share and apply the same, or so much thereof as they might deem necessary, to the use of the child for whom the share was intended, and to accumulate the remainder until said child should become of age or sooner die, and upon the coming of age to pay over to him or her the accumulations, and thereafter to apply the whole interest and income to the use of said beneficiary during life; upon the death of a child before or after coming of age to transfer the share to his or her children, and in case of the death of a child leaving no issue to transfer the share to the testator's surviving issue. In an action brought by

the executors for a judicial settlement of their accounts, it appeared that the testator left two children, both infants, one of whom died under age, intestate and unmarried. There had been a large accumulation of interest upon the share of the child so dying. *Held*, that until the death of the child the entire interest of her share vested at once when paid in, and only the time of payment over, or enjoyment, was postponed until majority; and so, that the administratrix of the deceased child was entitled to the accumulation. *Smith v. Parsons.* 116

2. *It seems*, that where a will so provides for the accumulation of interest on an infant's share during minority, the testator has power to make such disposition thereof, in case of the death of the infant during minority, as he may see fit; and so, may bequeath it to any person, whether a minor or of full age. Such a provision is not violative of the statute providing that accumulations must be for the benefit of minors. *Id.*

## ADJUDICATION.

See FORMER ADJUDICATION AND JUDGMENT.

## ADMISSIONS.

1. The admissions of parties, oral or written, not given in evidence on the trial, may not be received by an appellate court for the purpose of reversing the findings of the trial court. *People ex rel. Manh. R. Co. v. Barker.* 304

2. *It seems*, that mere silence upon the part of an executor, to whom a claim against the estate he represents has been presented, may not be regarded as an admission of the claim, and so relieve the claimant

from establishing it in the usual way or put upon the estate the burden of affirmatively establishing mistake or error. *Schutz v. Morette*. 137

### AGREEMENT.

See CONTRACT.

### AMENDMENT.

1. After entry of judgment in an equity action on findings of fact and conclusions of law, the Special Term, which tried the action, has no power on motion for a re-settlement of the findings and conclusions to make amendments therein, altering the decision on the merits and changing the substantial rights of the parties. *Heath v. N. Y. B. L. B. Co.* 260
2. The authority given to the court by the Code of Civil Procedure (§ 723) to make amendments is confined to such as do not affect the substantial rights of the parties. *Id.*

### AMOUNT IN CONTROVERSY.

See *Thacher v. Hope Cem. Assn.* 331

### ANIMALS.

Under the provisions of the act in relation to public health (§§ 62, 63, chap. 661, Laws of 1893) authorizing the state board of health to cause to be killed any animal affected with tuberculosis, and directing the payment to the owner of "the actual value at the time of destruction of any animal" so killed, to be determined by the Board of Claims, the owner is not entitled to the value of the animal considered as sound and unaffected by disease, but simply its actual value in its diseased condition. *Tappen v. State*. 44

### APPEAL.

1. Plaintiff having recovered a judgment against defendant on the re-

port of a referee for less than the damages demanded in the complaint appealed from so much thereof as awarded damages. Defendant appealed from the whole judgment. The General Term affirmed "the judgment from which plaintiff appeals," and reversed "the judgment from which the defendant appeals," and ordered a new trial, unless plaintiff stipulated to reduce the recovery as specified. Plaintiff failed to stipulate and judgment was entered in accordance with the order. *Id.* that the General Term had no authority to make the order; that if there was error in the judgment on the referee's report, this necessarily required the reversal of the entire judgment and a new trial as to the entire claim or a modification of the judgment. *Nat. Bk. M. Underwriters v. Nat. Bank Republic*. 64

2. Under the provision of the Code of Civil Procedure (§ 2545), declaring that a surrogate's decree "shall not be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," an appellate court is at liberty to disregard such an error if it could have had no influence upon the determination of the case. *In re Miner*. 121
3. In an action to recover payments alleged to be due on a contract the complaint alleged that the payments sought to be recovered were due February 1 and May 1, 1891. By the contract the payments were not due in advance. The testimony on the part of plaintiff was to the effect that the payments unpaid were for the quarter from February 1 to May 1, and from May 1 to August 1. The trial court found that defendant had not paid the payment for the quarter ending February 1, 1891. *Held*, that while there was no proof to sustain this finding, yet as it appeared that two quarterly payments were in fact due and unpaid, it was incumbent on defendant to raise the specific objection on the trial, and, as this was not done, it could not be raised upon

- appeal. *Mayor, etc., N. Y. v. N. Y. R. Cons. Co.* 210
4. The liability of a surety upon an undertaking, in the form prescribed by the Code of Civil Procedure (§§ 1352, 1356), given to stay proceedings on appeal from a final judgment to the General Term of the Supreme Court, is not terminated by the reversal of the judgment by the General Term, but continues and is enforceable in case of the ultimate affirmance of the judgment by this court on appeal from the order of General Term. *Foo Long v. Am. Surety Co.* 251
  5. Upon appeal to the General Term from a judgment in favor of plaintiff on trial at Circuit such an undertaking was given. The judgment was reversed and a new trial granted. After an appeal to this court from an order of General Term, and after a return had been made and the appeal noticed for argument, the parties stipulated that a judgment should be entered reversing the order of the General Term and affirming absolutely the judgment. On reading and filing said stipulation this court, without argument or consideration of the case on its merits, reversed the order and affirmed the judgment. The usual remittitur was sent down and judgment entered in accordance therewith. In an action upon the undertaking, *held*, that there was not an affirmance of the original judgment within the true intent and meaning of the undertaking, but in substance the original judgment was reinstated by consent of the parties; that the undertaking referred to a reversal or dismissal of the appeal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent. *Id.*
  6. An appeal direct to the United States Supreme Court is not authorized either by the United States Revised Statutes or the act of Congress of 1891 (Chap. 517, Laws of 1891), creating Circuit Courts of Appeal, from a decision of a judge of a District Court at Chambers, denying an application for a writ of habeas corpus. *In re Buchanan.* 264
  7. Such an appeal, therefore, does not operate as a stay, and where the writ was applied for in case of one imprisoned under judgment of a state court finding him guilty of murder and sentencing him to death, it furnishes no reason for delaying the execution of the sentence. *Id.*
  8. The admissions of parties, oral or written, not given in evidence on the trial, may not be received by an appellate court for the purpose of reversing the findings of the trial court. *People ex rel. Manh. R. Co. v. Barker.* 804
  9. Defendant appealed from an order denying a motion for a new trial, made upon the minutes of the judge, and also from the judgment entered on the verdict. The General Term reversed the judgment. Its order was upon plaintiff's motion amended, so as to show that the reversal was upon exceptions alone, and the order denying a motion for a new trial was affirmed upon the facts. *Held*, that the questions reviewed by the General Term upon appeal from the order denying a motion were not before this court, and as to them it had no jurisdiction, and as it appeared that the reversal of the judgment was upon questions of law only, they were reviewable here. *Edgecomb v. Buckhout.* 332
- See, also, *Thacher v. Hope Cem. Assn.* 381

## APPEARANCE.

1. The word "appearance" means a voluntary submission to the jurisdiction in whatever form manifested. *People v. Cowan.* 349
2. The law permitting a judgment to be entered upon a recognizance in the city of New York after an order of forfeiture constitutes part of the undertaking, and the party executing it consents that in case of forfeiture judgment may at once be entered thereon, upon which a general execution may be issued, and this constitutes a voluntary appearance in the action. *Id.*

## ASSESSMENT AND TAXATION.

1. The provision of the New York Consolidation Act (§ 879, chap. 410, Laws of 1882) declaring that no action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city or to remove a cloud on title, but that the property owners shall be confined to the remedies given, is not limited to actions wherein it is sought simply to vacate assessments or to remove clouds on title, but prohibits as well an action to restrain the creation of a cloud on title by means of a sale by virtue of an assessment and the giving of a lease consequent on such sale on the ground that the assessment is void. The relief sought in such a case is, in substance, a vacation of the assessment. *Scudder v. Mayor, etc., N. Y.* 245
2. The section was intended to confine property owners in all cases of alleged void assessments to the remedies provided for in the act. *Id.*
3. Under the provision of the act of 1857, in relation to the assessment of taxes on corporations liable to taxation (Chap. 456, Laws of 1857), which prescribes the method of assessing the capital stock of such a corporation, the actual value of its capital stock, not the market value of its share stock, is to be considered; that is, the assessment is to be limited to the tangible personal property and may not include the franchises of the corporation. *People ex rel. Manh. R. Co. v. Barker.* 304
4. Under the provisions of the Revised Statutes in reference to the assessment for taxation of real property (1 R. S. 393, § 17), which requires the assessors to assess the same at its "just and full value as they would appraise the same in payment of a just debt due from a solvent debtor," and also under the provision of the New York Consolidation Act (§ 814, chap. 410, Laws of 1882), which requires the assessment to be "at the sum for which such property under ordinary circumstances would sell," it is the duty

of the assessors to assess the property at its actual value. *Id.*

5. As the commissioners of taxes and assessments in the city of New York are sworn officers, in the absence of evidence to the contrary, it is to be presumed that they have performed their duty in making such an assessment. *Id.*
6. It is not to be presumed that the indebtedness of a corporation represents property to the amount of such indebtedness in addition to that represented by its capital stock. *Id.*
7. In making an assessment under said act of 1857 the earnings of the corporation may be considered by the assessors. *Id.*
8. Where, therefore, it appeared that the earnings of the corporation enabled it to pay its running expenses, necessary repairs and interest on its indebtedness, and to declare a dividend of six per cent and still have a surplus, *held*, it was proper to assume that its capital stock remains unimpaired, and that there are surplus assets sufficient to pay its outstanding indebtedness. *Id.*
9. In assessing personal property assessors are entitled to exercise more latitude than is permitted in assessing real property. *Id.*

## ASSIGNMENT.

1. The firm of F. Bros. & Co. being indebted to certain banks on promissory notes not yet due, and being in financial trouble, advised the banks of that fact, and entered into an agreement with them, in pursuance of which the banks surrendered the notes and received in place thereof the firm notes payable on demand, also an instrument in writing, by the terms of which the firm transferred to the banks as security all its stock in trade and fixtures, with authority to hold and sell the same and apply the net proceeds to the payment of the notes; any surplus to be paid over to the firm or its assigns. The banks took immediate



possession of the property so transferred, sold the same and applied the net proceeds ratably to the payment of the notes, such proceeds not being sufficient to pay the whole indebtedness. In an action by certain judgment creditors of the firm to set aside the transfer as being fraudulent and void against creditors these facts appeared: On the next day after the transaction said firm executed to other creditors various similar transfers which, as a whole, covered all the remaining property of the firm. These transfers bore the same date as the one in question. No general assignment for the benefit of creditors was made by the firm. The trial court found that at the time of the transfer and delivery of the property to the banks neither of them had any knowledge of any other transfer or intended transfer by the firm, and that the transaction was without intent to hinder, defraud or delay creditors. *Held*, that the complaint was properly dismissed; that so far as the evidence disclosed there was no relation or connection between the transaction with the banks and those with other creditors, and so they could not be considered as one and the same transaction, and there was no violation shown of the prohibition of the General Assignment Act (§ 30, chap. 503, Laws of 1887) prohibiting preferences in such an assignment exceeding one-third of the value of the assigned estate. *Maass v. Falk*, 34

2. *It seems*, that had there been a general assignment by the firm, and the transaction with the banks constituted an undue preference, plaintiffs' action was not the proper remedy; that instead of an action in their own behalf, it should have been in behalf of all the creditors excluded by the transfers from a share in the debtors' assets, to secure to them a ratable distribution of two-thirds thereof. *Id.*

#### ATTACHMENT.

In an action upon a promissory note, executed in this state by defendant, a New Jersey corporation,

payable by its terms two years from date, these facts appeared: At the time of the giving of the note defendant, to secure its payment, executed a chattel mortgage upon certain personal property specified therein, situate in New Jersey. The mortgage provided, among other things, that in case the mortgagor "permit or suffer any attachment or other process against property to be issued against it," that the debt secured "shall become instantly due and payable." About four months after the execution of the note an attachment was issued in an action against defendant in this state, which was levied upon some of its property here, and thereupon this action was brought. *Held*, that the property referred to in the provision as to attachments was that described in and covered by the mortgage; and so that, as no portion thereof had been levied upon by virtue of the attachment, the condition was not broken and the note was not due when the action was commenced. *Robertson v. O. E. Co.* 20

#### BANKS AND BANKING.

1. The M. S. Bank and the St. N. Bank entered into an agreement, by which the latter, which was a member of the New York Clearing House Association, a voluntary association of banks and bankers, agreed to act as agent of the former in clearing its checks through the clearing house; the M. S. Bank to keep at all times a balance of \$50,000 in money and \$100,000 of good bills receivable with the former. By the constitution of said association it is provided that whenever exchanges are made at the clearing house pursuant to arrangement between members, through one of them, and banks not members, the receiving bank at the clearing house shall in no case discontinue the arrangement without giving previous notice; the notice not to take effect until the exchanges of the morning following the receipt thereof shall have been completed. The M. S. Bank was aware of this resolution at the time of making

the arrangement, and it sent a letter to the clearing house committee, inclosing copy of a resolution signifying its acquiescence in the terms of the circular issued by that committee. On August 8, 1893, the St. N. Bank, desiring to terminate the arrangement because of failure of the M. S. Bank to keep up the prescribed cash balance, gave the notice required by said constitution, which was served upon the banks constituting the association. At this time the M. S. Bank was insolvent. The St. N. Bank was ignorant of that fact, but knew of it before exchanges were made on the next day. It held at the time certain collateral securities taken upon loans made upon notes of the M. S. Bank, and by agreement they or their proceeds might be applied to any other obligations of that bank. On August ninth the St. N. Bank paid, through the clearing house, checks drawn upon the M. S. Bank by depositors having amounts to their credit as such sufficient to meet the same. In an action brought by the receivers of the M. S. Bank to recover the securities so deposited or the proceeds thereof, *held*, that the arrangement was in effect a tripartite agreement between the banks and the association, made upon sufficient consideration, which could not be discontinued, nor did the liability of the St. N. Bank cease until after the completion of the exchanges of the morning after the notice; that said provision of the constitution was valid and binding, and was not affected by the provisions of the State Corporation Law (§ 43, chap. 687, Laws of 1892), which forbids the assignment or transfer of property by an insolvent banking corporation with the view of giving a creditor a preference; that the insolvency of the M. S. Bank did not excuse the St. N. Bank from the performance of its obligations to the clearing house banks; and so, that it was entitled to hold and apply the securities in payment of the amount so paid by it. *O'Brien v. Grant*. 163

2. Among the checks so paid by the St. N. Bank were two drawn Au-

gust 8, 1893, by the state treasurer on the M. S. Bank, which had state funds on deposit. These checks were on that day deposited by the treasurer with a trust company which kept accounts with two clearing house banks and had its checks cleared through them. Said checks were handed in to said banks a little before ten A. M. of August ninth, and were at once sent with other checks to the clearing house, where the business of clearances commences at ten o'clock. By the general and invariable custom of New York banks, checks received between ten A. M. of the day they bear date and ten A. M. of the next day are passed through the clearing house with the clearances of the morning of the latter day. It did not appear that the officers of the M. S. Bank knew of the manner in which the state treasurer's checks were deposited, and it appeared that it acted in good faith. *Held*, the presumption was that every check presented in the morning's clearances was held for value, and so, the St. N. Bank was justified in paying the same. *Id.*

#### BILLS, NOTES, CHECKS.

1. In an action upon a promissory note, executed in this state by defendant, a New Jersey corporation, payable by its terms two years from date, these facts appeared: At the time of the giving of the note defendant, to secure its payment, executed a chattel mortgage upon certain personal property specified therein, situate in New Jersey. The mortgage provided, among other things, that in case the mortgagor "permit or suffer any attachment or other process against property to be issued against it," that the debt secured "shall become instantly due and payable." About four months after the execution of the note an attachment was issued in an action against defendant in this state, which was levied upon some of its property here, and thereupon this action was brought. *Held*, that the property referred to in the provision as to attachments was that described in and covered by the

mortgage; and so that, as no portion thereof had been levied upon by virtue of the attachment, the condition was not broken and the note was not due when the action was commenced. *Robertson v. O. E. Co.* 20

2. Upon the day of the death of a decedent, and while he was in fact dying, a clerk of the firm of which he was a member, who held a power of attorney, authorized to sign checks for the firm, was requested by a messenger from the dying man's home to draw two checks for account of his wife; this the clerk did. The messenger received and caused the checks to be cashed, and deposited the money to the individual credit of the wife. *Held*, that proof of these facts did not justify a finding that the checks were delivered by the husband's authority, or that the authority of the clerk under the power had been validly called into exercise. *In re James.* 78

See BANKS AND BANKING.

## BRIDGES.

1. Under the provisions of the "Highway Law" (§ 130, chap. 568, Laws of 1890), fixing the liability for the expenses of the construction and repair of public free bridges as between a town and county, the right of a town to demand contribution from the county when the bridge expenditure of the town is in excess of one-sixth of one per cent of the assessed valuation of its taxable property, is not limited to expenditures for bridges which cross streams forming boundaries of the town, but applies as well to bridges erected wholly within the town. *People ex rel. Root v. Bd. Suprs.* 107

2. In proceedings by mandamus to compel the county of Steuben to levy a tax to pay the proportion alleged to be due from it under said act of the expense incurred by the town of Addison for the repair and construction of bridges, it appeared that a portion of the expenditure was for the construction

of a bridge in the village of Addison in said town. By the village charter the bridge was excepted from the jurisdiction of the village authorities, and left under the control of the commissioners of highways of the town. It was claimed by the board of supervisors that the bridge was not a town bridge within the statute. *Held*, untenable. *Id.*

## BROOKLYN (CITY OF).

1. Under the provision of the charter of the city of Brooklyn (§ 5, tit. 12, chap. 583, Laws of 1888) making it the duty of the health commissioner of that city to take such measures for the preservation of the public health from impending pestilence, and under the provision of the "Public Health Law" (§ 14, chap. 661, Laws of 1893) requiring every local board of health to "guard against the introduction of contagious and infectious diseases," and to "require the isolation of all persons \* \* \* infected with and exposed to such disease," to justify such isolation the fact must exist that the persons are infected with the contagious disease or have been exposed to it. No authority is given by said provisions to said health commissioner to quarantine any person simply because he refuses to be vaccinated, and to continue him in quarantine until he consents to such vaccination. *In re Smith.* 68

2. On application for a writ of habeas corpus, the relators' petition alleged that they were imprisoned and restrained of their liberty at their house in Brooklyn by the order and direction of the commissioner of health, that they had been exposed to no contagion, and were not afflicted with any contagious disease. In the return made by the commissioner to the writ, he alleged that for several months smallpox had been epidemic in the city; that as he was informed and believes, before ordering the relators to be detained in quarantine, they were engaged in the prosecution of the express delivery business in said.

city, and in its worst infected district; that the business includes the carrying of household furniture and other articles which may come from infected centres and be infected with the germs of smallpox; that the relators "were unusually exposed to such contagion," and it was "of special importance that they should be vaccinated at once," and that they were detained in quarantine because of their refusal to be vaccinated. *Held*, that a demurrer to the return was properly sustained; that said commissioner had no jurisdiction to make the order. *Id.*

3. Chapter 710, Laws of 1892, which authorizes the board of fire commissioners, with the approval of the board of estimate and apportionment, in all cities, the population of which, according to the last census, exceeds nine hundred thousand, to fix the salaries of the members of the fire department, modifies the charter of the city of Brooklyn (§ 6, tit. 13, chap. 583, Laws of 1888), relating to the compensation of officers of its fire department, and it is the duty of the fire commissioner of that city to fix the salaries referred to, as provided in said act. *In re People ex rel. Dobson.* 357

## BURDEN OF PROOF.

See EVIDENCE.

## BUSINESS CORPORATIONS

In an action against a stockholder of a limited liability corporation, organized under the Business Corporation Act of 1875 (Chap. 611, Laws of 1875), to enforce the liability imposed by the provision of said act (§ 37) declaring that the stockholders of such corporation shall be individually liable for its debts until the whole amount of its capital stock has been paid in and a certificate thereof has been recorded "in the office of the secretary of state and of the county in which the principal business office of such corporation is situated," the answer set forth, in substance, that within the time prescribed by

law, and more than four years before the commencement of the action, the entire capital stock was paid in, and a certificate setting forth that fact was filed with the secretary of state. On demurrer to this portion of the answer, *held*, that as the statute was defective in its specification of the county office where the certificate was to be recorded, the fact that it was not recorded in the county clerk's office did not, under the circumstances, impose the liability; that there was a substantial compliance with the provision of the statute; and so, that the demurrer was properly overruled. *Jones v. Butler.* 55

## CASES REVERSED, DISTINGUISHED, ETC.

*Nat. Bd. of Marine Underwriters v. Nat. Bank* (9 Misc. Rep. 688), reversed. See *Nat. Bd. of Marine Underwriters v. Nat. Bank.* 64

*Schutz v. Morette* (81 Hun, 518), reversed. See *Schutz v. Morette.* 137

*Marks v. R. R. Co.* (77 Hun, 77), reversed. See *Marks v. R. R. Co.* 181

*Sawyer v. Cubby* (73 Hun, 296), reversed. See *Sawyer v. Cubby.* 192

*Converse v. Sickles* (74 Hun, 429), reversed. See *Converse v. Sickles.* 200

*Tefft v. Munson* (57 N. Y. 97), distinguished. See *Oliphant v. Burns.* 233

*White v. Patten* (24 Pick. 324), distinguished. See *Oliphant v. Burns.* 233

*Reynolds v. Stockton* (140 U. S. 254), distinguished. See *Oliphant v. Burns.* 233

*Lennon v. Mayor, etc.* (55 N. Y. 361), distinguished. See *Scudder v. Mayor, etc.* 250

*Hankin v. Turner* (L. R. [10 Ch. Div.] 372), distinguished. See *In re Patterson.* 331

*Porter v. Purdy* (29 N. Y. 106) distinguished. See *In re Patterson*. 331

*Caujolle v. Ferrie* (13 Wall. 465), distinguished. See *In re Patterson*. 331

*In re Roderigas* (63 N. Y. 460), distinguished. See *In re Patterson*. 331

*Bolton v. Schrieffer* (135 N. Y. 65), distinguished. See *In re Patterson*. 331

*Edgecomb v. Buckhout* (83 Hun, 168), reversed. See *Edgecomb v. Buckhout*. 332

### CAUSE OF ACTION.

1. A cause of action upon an account stated does not rest upon the obligation originally created when the items of indebtedness arose, but upon the agreement of the parties, made after the transactions constituting the account, that a certain balance remains due from one to the other, and the promise of the former to pay this balance; and so, it is unnecessary in an action upon an account stated to set forth in the complaint the subject-matter of the original debt. *Schutz v. Morette*. 137

2. The complaint in an action against an executor alleged, in substance, that plaintiff presented a duly verified claim, which was set forth in full, against the decedent's estate, to defendant, who acknowledged its receipt, and although he has had a reasonable opportunity to examine into its validity and fairness he has not disputed or rejected the same, but refuses to pay it. The claim on its face, in connection with other facts averred in the complaint, showed presumptively that a part at least was barred by the Statute of Limitations at the time of the death of the testatrix. Upon demurrer to the complaint, *held*, that it did not state a cause of action. *Id.*

3. L. died in 1885, leaving defendant, his widow, and plaintiffs, his

three children, who were all under the age of fourteen, him surviving. After such death the widow and children continued to live in the dwelling house of the deceased, she taking care of the children and acting toward them as natural guardian. W. was appointed their general guardian upon the petition of defendant; this stated that the infants resided in the house and that no rent arose therefrom. In 1891 W. procured himself to be appointed guardian *ad litem* for the children, and as such brought this action to recover for the use and occupation of the dwelling house. It appeared that soon after the appointment of W. as general guardian he agreed to allow defendant \$1,000 a year for the maintenance and clothing of the children. No agreement was made for the payment of rent by defendant and no demand was made therefor, until a few days before the commencement of the action, and up to that time W. not only acquiesced in defendant's residence in said house, but consented to and advised it, and defendant's evidence showed and the jury found that it was expressly agreed that no rent was to be charged. *Held*, that the action was not maintainable. *Lamb v. Lamb*. 317

4. A new corporation having been organized by the transfer to it of the property and business of certain original corporations, upon an agreement between the corporations of all of them that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new corporation not reserved for the use of the treasury, certain stockholders in one of the original corporations brought an action against the new corporation for a delivery of its stock to them. *Held*, that the action was maintainable against the new corporation, and that such stockholders were not to be turned over for relief to their own original corporation after by agreement all its functions had ceased, although it might not be wholly dead—it appearing that the new corporation owed a contract duty

to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage. *Held* (BARTLETT, J., dissenting), that dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; that the intention of the testator was not to create a technical trust, but that his property should remain in specie for his widow's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it. *In re James*. 78

4. *It seems*, that mere silence upon the part of an executor, to whom a claim against the estate he represents has been presented, may not be regarded as an admission of the claim, and so relieve the claimant from establishing it in the usual way, or put upon the estate the burden of affirmatively establishing mistake or error. *Schutz v. Morette*. 137
5. An executor can neither by his promise or acknowledgment, oral or written, revive a debt against the estate of his testator barred by the Statute of Limitations. *Id.*
6. By the will of B. the executors were empowered to sell any and all of his real estate when in their judgment they might deem it for the best interests of the estate.

The executors sold the real estate; they paid, in discharge of the testator's debts a sum in excess of that realized from the personalty. In proceedings for a final accounting by the executors, *held*, that before distributing the proceeds of the sale among the residuary devisees, they were entitled to reimburse themselves therefrom for the sum so paid in excess of the personalty, and were entitled to a credit for that sum, and this, without regard to the question as to whether the power of sale was given for the purpose of paying debts. *In re Bolton*. 257

## DECREE.

*See* JUDGMENT.

## DEFINITIONS.

The word "appearance" means a voluntary submission to the jurisdiction in whatever form manifested. *People v. Cowan*. 848

## DEVISE.

Where a devise contains a clause, in terms a condition, that the devisee pay certain legacies, in the absence of any provision for re-entry or forfeiture, or of anything to support an inference that the testator intended the estate to depend upon performance of the requirement, the words used will be held to import a covenant, not a condition. *Cunningham v. Parker*. 29

## DIRECTOR.

*See* CORPORATION.

## DOMICILE.

*See* RESIDENCE.

## ELECTIONS.

1. Under the provision of the act of 1894, amending the Election Law (§ 37, chap. 275, Laws of 1894), which authorizes the cancellation of names on registry lists, a judge

at Chambers has the right to strike from a registry list the name of a person not qualified as a voter in the election district, or who cannot become so qualified before the election. *In re Goodman.* 284

2. *It seems*, however, the provision does not apply to a case of doubt, where there is a dispute about the facts, or ground for differing inferences, but only where the facts show affirmatively that the person is not and cannot become qualified. *Id.*

3. Where a person residing in one election district of a city removes to, takes and occupies a room in a seminary of learning in another district, as a student, and not permanently as a residence, he neither loses his residence nor gains a new residence in the seminary district by the removal, and is lawfully entitled to vote in the former district, not the latter. *Id.*

4. While the voter may change his legal residence into a new district in spite of the fact that he becomes a student in an institution of learning therein, presumably his occupation of rooms in the institution is only during the prescribed period of study, and so, such occupation is no evidence of a change of residence, but the facts to establish the change must be wholly independent of his presence in the new district as a student, and, *it seems*, should be clear and convincing to overcome the natural presumption. *Id.*

5. *It seems*, also, that a verified statement of the voter of a mental intention to change his residence is not, unless fortified by consistent acts, sufficient to overcome such presumption. *Id.*

#### ELECTRIC LIGHT COMPANIES.

Plaintiff's complaint alleged in substance these facts: R., plaintiff's assignor, being the owner of the exclusive right to sell certain patented machines and apparatus for electric lighting, entered into an agreement with certain persons for the organization of a stock

company for the purpose of introducing that method of electric lighting in the city of Rochester. The agreement provided that forty-eight per cent of the capital stock of the corporation should be transferred to R. in consideration of his assignment to the corporation of his rights under the patents for Monroe county, and also forty-eight per cent of any increase of the capital stock. Defendant, the B. E. L. Co., the contemplated corporation, was thereupon organized, and by a contract executed between it and R., the latter assigned to it his rights under the patents for Monroe county, and it agreed that in case its capital stock should be at any time thereafter increased (save a specified amount of increase which might be issued and sold for cash) forty-eight per cent of such increase would be issued and delivered to R. The company was prohibited from selling any of its interests or rights without the consent of R., but the right of any stockholder to sell his stock was recognized. Subsequently R. assigned all his rights and interests to plaintiff. Thereafter a consolidation was proposed between said corporation and three other electric and gas light corporations in said city, but was abandoned because plaintiff would not waive his right to the forty-eight per cent of increase of stock; thereupon the three other corporations consolidated, and the new corporation thus organized purchased all the stock of the B. E. L. Co., giving in exchange for each share so purchased five shares of its own stock, and thus it acquired the control and practical ownership of all the properties of the B. E. L. Co.; the corporate organization of the latter, however, was kept up, although the persons constituting its board of directors were also directors of the consolidated corporation. Plaintiff claimed that the new corporation had thus "completely absorbed," and was, to all intents and purposes, the old corporation, and that through the process by which the capital stock of the latter was acquired by the former there was an increase of such capital stock,

and that plaintiff was entitled to forty-eight per cent thereof. On demurrer to the complaint, *held*, that the facts alleged did not effect such an increase of the capital stock of the B. E. L. Co. as entitled plaintiff to the specified percentage thereof; and so, that the demurrer was properly sustained. *Einstein v. R. G. & E. Co.* 46

#### EMINENT DOMAIN.

1. When a petition, which institutes proceedings for the condemnation of real property, is properly and duly presented to the Supreme Court, that court is required, if no sufficient cause is shown in opposition, to make an order appointing commissioners to ascertain the compensation to be made to the property owner; and, when their report comes on to be confirmed by the court, then is the time for judicial action upon it, either in confirming it, or in setting it aside for irregularity or for error of law in the proceedings. *In re Southern Boulevard R. R. Co.* 352
2. Where, therefore, in such proceedings, it appeared that the land proposed to be condemned was laid out as a boulevard under the provisions of chapter 290, Laws of 1887, section 24 of which prohibited the construction of rail or tramways thereon, without a special act of the legislature, and provided that in such case nothing should affect the owner's right to recover the full value of the land taken, as if the boulevard had never been laid out; and it also appeared that chapter 723, Laws of 1887, amended said section by excepting from said prohibition railroad companies organized under chapter 252, Laws of 1884, of which the petitioner was one, and the court refused to appoint commissioners, upon the ground that, as the act of 1887 had been held to be unconstitutional, it had no power to authorize proceedings under said act, *held*, that such power was conferred upon the Supreme Court by the General Railroad Law, and was not affected by the said act of 1887;

that its provisions were for the consideration of the tribunal to be constituted by the order of the court or of the court itself upon the coming in of its report, and that the refusal to appoint commissioners was error. *Id.*

#### EMPLOYER AND EMPLOYEE.

*See* MASTER AND SERVANT.

#### ESTOPPEL.

The question of *res adjudicata*, estoppel or a bar, by reason of a former judgment, cannot be disposed of on the judgment alone, but is to be determined by the judgment roll. *Converse v. Sickles.* 200

#### EVIDENCE.

1. On the trial of an action upon an insurance policy one of the plaintiffs was permitted to testify that after the death of H. she delivered the policy to C., and stated at the time that her father had told her of the making of the alleged agreement between him and C., and that the latter admitted she made the agreement. C. was alive at the time of the trial. *Held*, that the evidence was properly received; that it was not incompetent under the provisions of the Code of Civil Procedure (§ 829) as it simply tended to prove an admission of C. against her interest, not a personal transaction or conversation between the witness and a deceased person. *Hirsh v. Auer.* 13
2. A son of C., who was not a party to the action or beneficiary under the agreement, was also called as a witness for plaintiffs as to conversations with his father. *Held*, that the witness was not so interested as to prevent his testifying. *Id.*
3. *It seems*, that mere silence upon the part of an executor, to whom a claim against the estate he represents has been presented, may not be regarded as an admission of the



claim, and so relieve the claimant from establishing it in the usual way, or put upon the estate the burden of affirmatively establishing mistake or error. *Schutz v. Morette*. 187

4. While a voter may change his legal residence into a new district in spite of the fact that he becomes a student in an institution of learning therein, presumably his occupation of rooms in the institution is only during the prescribed period of study, and so, such occupation is no evidence of a change of residence, but the facts to establish the change must be wholly independent of his presence in the new district as a student, and, *it seems*, should be clear and convincing to overcome the natural presumption. *In re Goodman*. 284

5. *It seems*, also, that a verified statement of the voter of a mental intention to change his residence is not, unless fortified by consistent acts, sufficient to overcome such presumption. *Id.*

6. The admissions of parties, oral or written, not given in evidence on the trial, may not be received by an appellate court for the purpose of reversing the findings of the trial court. *People ex rel. Manh. R. Co. v. Barker*. 304

7. Plaintiff, an unmarried woman, entered into the service of W., defendant's intestate, as a housekeeper, and to render such other services as should be required of her, under an agreement that she was to be compensated for her services by certain specified provisions in his will. Plaintiff having received and accepted an offer of marriage, notified W. thereof, stating to him her willingness to carry out and continue the performance of her contract, and that her proposed husband was entirely willing she should do so. W. refused to receive her services as a married woman, and discharged her soon after she married. In an action upon the contract it appeared that W. was a man of wealth, and that his establishment was conducted on a lavish scale of

expenditure. Plaintiff called M. as a witness, who testified that she had conducted boarding houses of the highest class in the city of New York, had hired many housekeepers and paid them their wages, and that their services were fairly worth the amount paid, which was stated. This testimony was received under objection and exception. *Held*, no error. *Edgecomb v. Buckhout*. 332

8. Said witness also testified that she had seen plaintiff at various times doing sewing of all kinds and mending for W. The witness was then asked and permitted to answer as to the value of such services, assuming that they were in each month of about the same proportion as when named by the witness. This was objected to, among other things, on the ground that the complaint merely set forth the employment of plaintiff as a housekeeper, and this did not include plaintiff's services as a seamstress. *Held*, untenable. *Id.*

See, also, *Blazy v. McLean*. 390

## EXCEPTION.

See APPEAL.

## EXECUTORS AND ADMINISTRATORS.

1. D., by his will, after directing the payment of his debts by his executor, and after giving various legacies, devised and bequeathed all the residue of his estate, real and personal, to his son A., "on the condition and proviso that he pay" the said legacies within four years after the death of the testator, and the real estate so devised to A. was charged with the payment of the same. A. was appointed executor; he accepted the devise and went into possession of the real estate, but did not pay the legacies within the four years. At the death of D. his personalty was insufficient to pay his debts. In an action brought by creditors of the decedent under the Code of Civil Procedure (§ 1844, *et seq.*) to reach and apply the real estate to

the payment of their debts, *held*, that the failure to pay the legacies did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the land so devised to him. *Cunningham v. Parker*. 29

2. A husband executed and delivered two bonds to his wife as a gift. The bonds were secured by mortgages upon lands in another state. An action of foreclosure was brought in that state during the lifetime of the husband, in which he and his grantees were made parties defendant, and process was served upon them out of the state; he did not appear. A judgment of foreclosure and sale was entered in which the amount due upon the bonds was fixed. After the death of the husband the mortgaged premises were sold under the judgment. Upon settlement of the accounts of the widow as executrix of her husband's will, she presented a claim against the estate for the amount of the bonds less the amount realized on the sale. *Held*, that she was not entitled to an allowance of the claim; but that while said judgment had no effect to create a personal liability upon the bonds, it was conclusive as to the ownership of the mortgages and the right of the mortgagee to have the mortgaged premises sold and the proceeds applied upon the amount represented by the bonds. *In re James*. 78

3. By the will of the deceased husband he gave to his wife "for her sole use, enjoyment and benefit, during her life, without restraint, deduction or interference in any manner whatsoever," one-half of the income of all his property, "of every kind," during her life; the remainder of the income, and the estate itself, after the death of the wife, he gave to his "legal heirs," subject to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no

bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage. *Held* (BARTLETT, J., dissenting), that dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; that the intention of the testator was not to create a technical trust, but that his property should remain in specie for his widow's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it. *Id.*

4. The will of C. directed his executors to divide one-half of his estate into as many equal shares as he should leave children him surviving, to collect the interest on each share and apply the same, or so much thereof as they might deem necessary, to the use of the child for whom the share was intended, and to accumulate the remainder until said child should become of age or sooner die, and upon the coming of age to pay over to him or her the accumulations, and thereafter to apply the whole interest and income to the use of said beneficiary during life; upon the death of a child before or after coming of age to transfer the share to his or her children, and in case of the death of a child leaving no issue to transfer the share to the testator's surviving issue. In an action brought by the executors for a judicial settlement of their accounts, it appeared that the testator left two children, both infants, one of whom died under age, intestate and unmarried. There had been a large accumulation of interest upon the

share of the child so dying. *Held*, that until the death of the child the entire interest of her share vested at once when paid in, and only the time of payment over, or enjoyment, was postponed until majority; and so, that the administratrix of the deceased child was entitled to the accumulation. *Smith v. Parsons.* 116

5. *It seems*, that mere silence upon the part of an executor, to whom a claim against the estate he represents has been presented, may not be regarded as an admission of the claim, and so relieve the claimant from establishing it in the usual way, or put upon the estate the burden of affirmatively establishing mistake or error. *Schutz v. Morette.* 137

6. An executor can neither by his promise or acknowledgment, oral or written, revive a debt against the estate of his testator barred by the Statute of Limitations. *Id.*

7. An acknowledgment of a debt by an executor will not, in the absence of an express promise to pay, take the case out of the statute. *Id.*

8. The complaint in an action against an executor alleged, in substance, that plaintiff presented a duly verified claim, which was set forth in full, against the decedent's estate, to defendant, who acknowledged its receipt, and although he has had a reasonable opportunity to examine into its validity and fairness he has not disputed or rejected the same, but refuses to pay it. The claim on its face, in connection with other facts averred in the complaint, showed presumptively that a part at least was barred by the Statute of Limitations at the time of the death of the testatrix. Upon demurrer to the complaint, *held*, that it did not state a cause of action. *Id.*

9. By the will of B. the executors were empowered to sell any and all of his real estate when in their judgment they might deem it for the best interests of the estate. The executors sold the real estate; they paid, in discharge of the tes-

tator's debts, a sum in excess of that realized from the personality. In proceedings for a final accounting by the executors, *held*, that before distributing the proceeds of the sale among the residuary devisees, they were entitled to reimburse themselves therefrom for the sum so paid in excess of the personality, and were entitled to a credit for that sum, and this, without regard to the question as to whether the power of sale was given for the purpose of paying debts. *In re Bolton.* 257

10. McC. died leaving a widow and four children, who were minors, him surviving. By his will he gave to a son, the oldest child, one-fourth of all his residuary estate after payment of debts, and after deducting the widow's dower right, the same to be paid to him in cash on his becoming of age. The residue was given to the widow for life, the remainder to the three younger children. The widow was appointed executrix with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions" of the will or whenever in her judgment it might be for the best interest of the estate, "applying the proceeds to the benefit of \* \* \* said estate." The real estate was all incumbered. The widow, acting under the power of sale, sold a lot to D. for \$9,000, receiving \$3,000 in cash and D.'s bond for the balance, secured by mortgage on the premises. The money was used in paying incumbrances on the real estate. Subsequently, under an arrangement between the widow and D., the latter deeded back the lot; his mortgage thereon was canceled and the widow executed a mortgage thereon to secure a loan made to pay the son his share, he having come of age. To secure D. the \$6,000 paid by him, the widow executed her bond and to secure it a mortgage, as executrix, on another lot, which recited the power in the will, and that the bond was executed by her, as executrix, under the power. This mortgage was foreclosed and the purchaser on foreclosure sale refused to complete the purchase,

power to determine it upon affidavits, where a large amount is involved and the conflict is sharp, the question should be determined upon common-law evidence. *Id.*

5. Under the provision of the act of 1864, amending the Election Law (§ 37, chap. 275, Laws of 1894), which authorizes the cancellation of names on registry lists, a judge at Chambers has the right to strike from a registry list the name of a person not qualified as a voter in the election district, or who cannot become so qualified before the election. *In re Goodman.* 284

6. *It seems*, however, the provision does not apply to a case of doubt, where there is a dispute about the facts, or ground for differing inferences, but only where the facts show affirmatively that the person is not and cannot become qualified. *Id.*

7. Under the provision of the Code of Civil Procedure (§ 1323) providing that "when a final judgment or order is reversed on appeal the appellate court or the General Term of the same court, as the case may be, may compel restitution of property," etc., when a judgment of the City Court of New York has been affirmed by the General Term of that court, but subsequently reversed by the General Term of the Court of Common Pleas and the case remitted to the City Court for a new trial, and when pending the appeals the property of the judgment debtor has been sold on execution, a motion for restitution may properly be made at the General Term of the City Court. *Carlson v. Winterson.* 345

See SURREGATES' COURTS.

#### CRIMINAL LAW.

1. An appeal direct to the United States Supreme Court is not authorized either by the United States Revised Statutes or the act of Congress of 1891 (Chap. 517, Laws of 1891), creating Circuit Courts of Appeal, from a decision of a judge of a District Court at

Chambers, denying an application for a writ of habeas corpus. *In re Buchanan.* 284

2. Such an appeal, therefore, does not operate as a stay, and where the writ was applied for in case of one imprisoned under judgment of a state court finding him guilty of murder and sentencing him to death, it furnishes no reason for delaying the execution of the sentence. *Id.*

3. *It seems*, it was not the purpose of the fourteenth amendment to the United States Constitution, declaring that no state shall "deprive any person of life, liberty or property without due process of law," to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of those courts over crimes and offenses, defined and declared by its laws and committed within its territorial jurisdiction. *Id.*

4. *It seems*, also, that while in case of accusation of crime the accused is entitled to an inquiry, a hearing and a judgment before he can be deprived by sentence of his liberty or life, within these limitations what constitutes "due process of law" is to be determined by the state in every case where it can exercise rightful authority, and said amendment confers no jurisdiction upon the Federal courts to supervise the administration by state tribunals of the criminal law of the state, to correct errors committed on trial, or to modify or change their judgments. *Id.*

5. A reprieve to a day certain granted by the governor in a capital case, which day is beyond the week in which, by order of the court, the execution was to take place, does not render it necessary to have the prisoner brought before the court to have the time of execution again fixed, but authorizes the execution of the sentence on the day on which the reprieve terminates. *Id.*

6. The distinction between a reprieve and a suspension of sentence pointed out. *Id.*

did not drop upon the platform, but upon the stanchions or chute; that the jury properly found defendant guilty of negligence in leaving the stanchions and chute in the condition they were and the area but partially covered by the narrow platform; and so, that it had failed to furnish a proper fire escape within the meaning of the statute. *Johnson v. S. G. & L. Co.* 152

## FALSE REPRESENTATIONS.

*See* SALES.

## FERRIES.

1. In 1867 defendant granted to plaintiff the right to operate a ferry, and executed to it a lease of certain slips and bulkheads for the term of ten years, by the terms of which plaintiff was to erect the necessary ferry fixtures and to yield them up to defendant at the end of the term, subject, however, to the right reserved to such a lessee by the provision of the city charter of 1857 (§ 41, chap. 446, Laws of 1857), requiring all persons acquiring any ferry lease to purchase at a fair valuation the boats, buildings and other property of a former lessee necessary for the purposes of such ferry grant. Subsequently, by agreement between the parties, plaintiff surrendered the premises covered by the lease and accepted in lieu thereof a lease of other premises for the balance of the original term; in and by which defendant covenanted that in case a new lease should not be granted to plaintiff, defendant would pay for the buildings and ferry fixtures erected by plaintiff on the demised premises, "in the manner provided for in and by the said first-mentioned recited indenture or lease." At the termination of this lease plaintiff demanded a renewal at the same rental, which defendant refused, and a lease was executed to another ferry company at an increased rental. In an action upon said covenant to recover the value of the buildings and ferry fixtures erected by plaintiff, *held*, that the

rights of the parties were not affected by the revised charter of 1870 (Chap. 137, Laws of 1870), and that defendant was under no obligation to renew the lease at the same rental as provided for by the old lease. *N. Y. & B. F. Co. v. Mayor, etc., N. Y.* 145

2. It appeared that the ferry company to whom the new lease was executed was organized by plaintiff's officers for its benefit and that of its stockholders. *Held*, that in effect the new lease was issued to plaintiff, it having become its own successor under a new name; and so it had no cause of action. *Id.*

## FINDINGS.

1. After entry of judgment in an equity action on findings of fact and conclusions of law, the Special Term, which tried the action, has no power on motion for a re-settlement of the findings and conclusions to make amendments therein, altering the decision on the merits and changing the substantial rights of the parties. *Heath v. N. Y. B. L. B. Co.* 260
2. The authority given to the court by the Code of Civil Procedure (§ 723) to make amendments is confined to such as do not affect the substantial rights of the parties. *Id.*

## FIRE DEPARTMENT.

Chapter 710, Laws of 1892, which authorizes the board of fire commissioners, with the approval of the board of estimate and apportionment, in all cities, the population of which, according to the last census, exceeds nine hundred thousand, to fix the salaries of the members of the fire department, modifies the charter of the city of Brooklyn (§ 6, tit. 18, chap. 588, Laws of 1888), relating to the compensation of officers of its fire department, and it is the duty of the fire commissioner of that city to fix the salaries referred to, as provided in said act. *In re People ex rel. Dobson.* 857

## FIRES.

In an action to recover damages for injuries sustained by plaintiff, an employee of defendant, alleged to have been caused by its negligent omission to construct a fire escape sufficient to meet the requirements of the act directing the construction of fire escapes on the outside of factories like that of the defendant (Chap. 409, Laws of 1886, as amended by chap. 462, Laws of 1887), these facts appeared: There was a door in the rear of the factory opening on the first floor; this was three feet above the court yard, and beneath this was an area giving access to the basement. To reach this door three steps leading to a platform in front of the door had originally been erected over the area, forming a covering to it. The platform and steps were supported by iron stanchions. There was a fire escape ladder directly over the platform, its lowest round ten feet above it. Prior to the fire this entrance to the factory had been closed and the steps leading to the platform; also, as plaintiff's evidence tended to show, one plank of the platform had been removed for the purpose of putting in a chute running from the court yard to the bottom of the area, leaving the iron stanchions exposed and so much of the area uncovered. The evidence authorized a finding that the portion of the platform left was so narrow as to render it impossible for a person dropping vertically from the ladder to land upon it. The factory caught fire, and plaintiff, to escape from the burning building, went down the ladder, and when his feet were on the bottom round, became unconscious and dropped therefrom. When he recovered consciousness he found himself lying across the chute. The court charged that if plaintiff dropped upon the platform and was there injured he could not recover. *Held*, that the evidence justified a finding that plaintiff did not drop upon the platform, but upon the stanchions or chute; that the jury properly found defendant guilty of negligence in leaving the stanchions and chute in the condition they

were and the area but partially covered by the narrow platform; and so, that it had failed to furnish a proper fire escape within the meaning of the statute. *Johnson v. S. G. & L. Co.* 152

## FORECLOSURE.

1. In October, 1870, H. was the owner of a tract of land subject to a purchase-money mortgage; he conveyed a portion thereof to a seminary, and C., the mortgagee, before the conveyance, executed to H. a release, absolute in its terms, of that portion from the lien of the mortgage. The deed of H. stated that the land was granted on the condition that it should be kept and used as a theological seminary; the grantee covenanted that it would, within five years, erect buildings on the premises for that purpose, and, in case of default, would, upon request, re-convey to H. In April, 1871, H., his wife and C. entered into a contract by which it was agreed that the land conveyed by said mortgage, except that portion to which the seminary "may retain title," and also other lands owned by H. and wife, should be sold off in lots and the purchase money divided between the parties in specified proportions. In June, 1871, H. conveyed certain other portions of the tract to W., which was also released by C. from the purchase-money mortgage. In May, 1873, the seminary re-conveyed to H. the land so conveyed to it by him, and in June, 1879, W. re-conveyed to H. the portion so conveyed to him. Thereafter H. and wife executed to M., the original plaintiff herein, two mortgages on the portions, so re-conveyed to him by the seminary and W. In an action to foreclose said mortgages defendants claimed that by reason of the covenant for re-conveyance in the deed to the seminary the land conveyed, upon being re-conveyed to H., became subject to the agreement and subject to be sold under its provisions, and although M. had no actual notice of the agreement that the record thereof was constructive notice;

and so, that she took her mortgage subject to the rights of third parties provided for in the agreement. *Held*, untenable. *Oliphant v. Burns.* 218

2. In July, 1880, an action was brought by the executors of C. against H. and others to enforce specific performance of the said agreement. The complaint, in describing the property to be affected, excluded the parcels sold to the seminary and to W. M. was made one of the defendants. She appeared and set up the releases, and thereupon, by consent, the complaint was dismissed as to her. The judgment therein, to which none of the remaining defendants appeared to have raised any objection, directed the sale of the seminary parcel with the land described in the complaint. After the commencement of the action, but before entry of judgment therein, one of plaintiffs' mortgages was executed. *Held*, that the *lis pendens* in that action was no notice to M., as the complaint excluded the seminary parcel, and any agreement between third parties to include it therein and in the judgment was ineffectual to affect her rights under her mortgage, and, therefore, so far as she was concerned, there was a legal unincumbered title in H. at the time he executed the mortgages in question. *Id.*

3. Also, *held*, that it was not necessary for the complaint to allege or for plaintiff to prove as part of her case that the mortgages were given for value; that while it might have been her duty to do this, after proof of the agreement by defendant, no objection having been taken on the trial because of failure to make this proof, the question could not be presented on appeal. *Id.*

4. Pursuant to the judgment in the action for specific performance the seminary tract was sold to defendant B. By the judgment the referee appointed to sell was directed to pay all liens for taxes or assessments. Upon petition of the referee, and after hearing and upon request of B. and other purchasers, but without notice to the

plaintiff in that action or to H. or M., an order was made directing the referee to pay out of the purchase moneys a sum which had been agreed upon between the purchasers and the town for taxes on the property included in the judgment, and also upon that conveyed by H. to W. and re-conveyed by him to H. By the order the purchasers, on proof of payment of the taxes, were allowed to retain the tax leases, certificates and assignments to them by the town, for the protection of their title. Upon the trial of this action B. claimed title and possession under the tax leases; that their validity could not be determined in this action, and that the same were paramount to the mortgages. *Held*, untenable; that while it was to be presumed that the seminary parcel was inserted in the judgment and sold with the consent of the parties to the action, the premises were in law sold subject to M.'s mortgages, and the duty of paying the taxes rested upon the mortgagor, which duty was discharged by the payment out of the proceeds of sale; and so, although by the order the purchasers were allowed to take assignments, this did not alter the character of the payment, and the taxes and tax titles were thereby extinguished. *Id.*

5. Subsequent to the re-conveyance to H. of the lots conveyed by him to W., H. conveyed them to another, and on the same day the grantee conveyed them to the wife of H., in whose name the title stood when the second mortgage to M. was executed; she died intestate, and through conveyances from her husband and heirs S. W. P. acquired title; he, after the payment of the taxes as above stated, conveyed the premises to his son, defendant C. W. P., "subject to all liens and incumbrances." S. W. P. purchased certain lots at the referee's sale and joined with B. in the request for the order as to payment of taxes. *Held*, that while, if S. W. P. had taken possession under his tax title, he might have set up such title and claimed it paramount to the mortgages, and while

the validity of the claim could not have been litigated in the foreclosure suit, yet, as S. W. P. had conveyed the premises subject to all liens and incumbrances, it was competent for plaintiff to show that the tax title had been extinguished, and this having been proved, the mortgages were existing liens, and the title of the grantee C. W. P. was subject to them; that while the premises were not included in the judgment in the specific performance suit, yet, as part of the proceeds of the sales therein, which were in fact moneys of the mortgagor, were applied in payment of such taxes at the request of S. W. P., he could not claim that the payment was made by himself; and so, that the tax title was preserved. *Id.*

6. Also *held*, that the report of the referee, in which he stated the payment by him of the taxes, pursuant to the order, was competent evidence and sufficient, in the absence of any proof to the contrary, to show the payment even as against the said purchasers B. and S. W. P. *Id.*

7. The lots purchased by S. W. P. at such referee's sale were also included in the conveyance by H. to W., and were re-conveyed with the other land by the latter to the former, and were included in plaintiff's mortgages. They were never released from the purchase-money mortgage, and were included in the agreement. They were directed to be sold by the judgment in this action subject to said mortgage. *Held*, that as to these lots also it was incompetent for the purchaser to use the money of the mortgagor for the purpose of purchasing the tax title and setting it up as paramount to plaintiff's mortgages; and that the provision in the judgment as to their sale was proper. *Id.*

8. McC. died leaving a widow and four children, who were minors, him surviving. By his will he gave to a son, the oldest child, one-fourth of all his residuary estate after payment of debts, and after deducting the widow's dower right, the same to be paid to him in cash on his becoming of age.

The residue was given to the widow for life, the remainder to the three younger children. The widow was appointed executrix with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions" of the will or whenever in her judgment it might be for the best interest of the estate, "applying the proceeds to the benefit of \* \* \* said estate." The real estate was all incumbered. The widow, acting under the power of sale, sold a lot to D. for \$9,000, receiving \$6,000 in cash and D.'s bond for the balance, secured by mortgage on the premises. The money was used in paying incumbrances on the real estate. Subsequently, under an arrangement between the widow and D., the latter deeded back the lot; his mortgage thereon was canceled and the widow executed a mortgage thereon to secure a loan made to pay the son his share, he having come of age. To secure D. the \$6,000 paid by him, the widow executed her bond and to secure it a mortgage, as executrix, on another lot, which recited the power in the will, and that the bond was executed by her, as executrix, under the power. This mortgage was foreclosed and the purchaser on foreclosure sale refused to complete the purchase, claiming the title to be defective, on the ground that the bond was not signed by the executrix in her official capacity. *Held*, untenable. *Roarty v. McDermott.* 296

9. The widow, as executrix and individually, and the three infant children were made parties to the foreclosure suit, and the latter appeared by guardian. The complaint set forth the power of sale and alleged that the mortgage was executed in pursuance of the power. *Held*, that the judgment was conclusive as against all the defendants in that action, that the mortgage was executed under and pursuant to the power and that it was a valid lien. *Id.*

## FOREIGN CORPORATIONS.

1. *It seems*, that under the provision of the Code of Civil Procedure in



regard to the service of summons upon a foreign corporation which authorizes the service by delivery of a copy to "a managing agent" of the corporation within the state, it is not necessary that the office of the person to whom the copy is delivered should be precisely described as "managing agent," but it was intended that any person holding some responsible and representative relation to the company, such as the term "managing agent" would include, might be served. *Coler v. P. Br. Co.* 281

2. In an action against a foreign corporation a copy of the summons was delivered in this state to C., who the plaintiff claimed was a managing agent of defendant. Upon a motion to set aside the service the moving affidavits alleged that C. is not and was not at the time of the service defendant's managing agent in any sense, but was its "representative" in the city of Chicago, where he resided, and was only temporarily visiting in the city of New York, when served. The opposing affidavits were to the effect that C. was in New York at the time, upon business connected with the company; that he stated that he represented it, and that his name appeared in the Chicago city directory as "manager" of the company. *Held*, that sufficient was not shown to establish that C. was managing agent of defendant within the meaning of said provision; and so, that there was no valid service of the summons. *Id.*

#### FORMER ADJUDICATION.

The question of *res adjudicata*, estoppel or a bar, by reason of a former judgment, cannot be disposed of on the judgment alone, but is to be determined by the judgment roll. *Converse v. Sickles.* 200

#### FRAUD.

1. Where a sale of goods on credit has been induced by fraud on the part of the purchaser, the vendor may, on discovery of the fraud, disaffirm the sale and follow the

proceeds of the goods in the hands of a sheriff, who has levied upon and sold them by virtue of an execution against the purchaser. *Converse v. Sickles.* 200

2. Defendant, a sheriff, under executions against F. R. & Co., levied upon certain goods which had been sold on credit by plaintiff to that firm. Plaintiff, claiming that the sale was induced by fraud, disaffirmed the sale, and brought an action of replevin to recover the goods. On trial of said action plaintiffs' counsel, in his opening, stated that he was unable to show that a demand upon defendant for a return of the goods was made and refused, and conceded that the goods had been taken by plaintiffs and disposed of. Thereupon, on motion of defendant's counsel, a verdict was rendered for defendant for a return of the goods, and assessing their value at a sum agreed upon. Judgment was entered and plaintiffs paid the amount thereof, but served on defendant a demand in writing for a return of the money, which they claimed as the proceeds of goods obtained from them by fraud. On refusal to return, this action was brought, plaintiffs claiming to charge defendant as trustee for the proceeds of their goods in his hands, and asking for an accounting and payment over of such proceeds. *Held*, that the judgment in the replevin suit was not conclusive against plaintiffs, either as *res adjudicata*, estoppel or a bar; that the decision was in effect simply that the action was prematurely brought, and there was no adjudication on the merits. *Id.*
3. Also, *held*, that it was immaterial that the moneys paid over to the sheriff were not the identical moneys received by plaintiffs for the goods; that as they were paid over as the proceeds they were to be so regarded. *Id.*

#### FRAUDULENT CONVEYANCES.

1. The firm of F. Bros. & Co. being indebted to certain banks on promissory notes not yet due, and

being in financial trouble, advised the banks of that fact, and entered into an agreement with them, in pursuance of which the banks surrendered the notes and received in place thereof the firm notes payable on demand, also an instrument in writing, by the terms of which the firm transferred to the banks as security all its stock in trade and fixtures, with authority to hold and sell the same and apply the net proceeds to the payment of the notes; any surplus to be paid over to the firm or its assigns. The banks took immediate possession of the property so transferred, sold the same and applied the net proceeds ratably to the payment of the notes, such proceeds not being sufficient to pay the whole indebtedness. In an action by certain judgment creditors of the firm to set aside the transfer as being fraudulent and void against creditors these facts appeared: On the next day after the transaction said firm executed to other creditors various similar transfers which, as a whole, covered all the remaining property of the firm. These transfers bore the same date as the one in question. No general assignment for the benefit of creditors was made by the firm. The trial court found that at the time of the transfer and delivery of the property to the banks neither of them had any knowledge of any other transfer or intended transfer by the firm, and that the transaction was without intent to hinder, defraud or delay creditors. *Held*, that the complaint was properly dismissed; that so far as the evidence disclosed there was no relation or connection between the transaction with the banks and those with other creditors, and so they could not be considered as one and the same transaction, and there was no violation shown of the prohibition of the General Assignment Act (§ 30, chap. 503, Laws of 1887) prohibiting preferences in such an assignment exceeding one-third of the value of the assigned estate. *Mauss v. Falk*. 34

2. *It seems*, that had there been a general assignment by the firm,

and the transaction with the banks constituted an undue preference, plaintiffs' action was not the proper remedy; that instead of an action in their own behalf, it should have been in behalf of all the creditors excluded by the transfers from a share in the debtors' assets, to secure to them a ratable distribution of two-thirds thereof. *Id*.

#### FREE PASS.

*See* PASS.

#### GAS LIGHT COMPANIES.

Plaintiff's complaint alleged in substance these facts: R., plaintiff's assignor, being the owner of the exclusive right to sell certain patented machines and apparatus for electric lighting, entered into an agreement with certain persons for the organization of a stock company for the purpose of introducing that method of electric lighting in the city of Rochester. The agreement provided that forty-eight per cent of the capital stock of the corporation should be transferred to R. in consideration of his assignment to the corporation of his rights under the patents for Monroe county, and also forty-eight per cent of any increase of the capital stock. Defendant, the B. E. L. Co., the contemplated corporation, was thereupon organized, and by a contract executed between it and R., the latter assigned to it his rights under the patents for Monroe county, and it agreed that in case its capital stock should be at any time thereafter increased (save a specified amount of increase which might be issued and sold for cash) forty-eight per cent of such increase would be issued and delivered to R. The company was prohibited from selling any of its interests or rights without the consent of R., but the right of any stockholder to sell his stock was recognized. Subsequently R. assigned all his rights and interests to plaintiff. Thereafter a consolidation was proposed between said corporation and three other electric and gas

light corporations in said city, but was abandoned because plaintiff would not waive his right to the forty-eight per cent of increase of stock; thereupon the three other corporations consolidated, and the new corporation thus organized purchased all the stock of the B. E. L. Co., giving in exchange for each share so purchased five shares of its own stock, and thus it acquired the control and practical ownership of all the properties of the B. E. L. Co.; the corporate organization of the latter, however, was kept up, although the persons constituting its board of directors were also directors of the consolidated corporation. Plaintiff claimed that the new corporation had thus "completely absorbed," and was, to all intents and purposes, the old corporation, and that through the process by which the capital stock of the latter was acquired by the former there was an increase of such capital stock, and that plaintiff was entitled to forty-eight per cent thereof. On demurrer to the complaint, *held*, that the facts alleged did not effect such an increase of the capital stock of the B. E. L. Co. as entitled plaintiff to the specified percentage thereof; and so, that the demurrer was properly sustained. *Einstein v. R. G. & E. Co.* 46

#### GUARDIAN AND WARD.

1. L. died in 1885, leaving defendant, his widow, and plaintiffs, his three children, who were all under the age of fourteen, him surviving. After such death the widow and children continued to live in the dwelling house of the deceased, she taking care of the children and acting toward them as natural guardian. W. was appointed their general guardian upon the petition of defendant; this stated that the infants resided in the house and that no rent arose therefrom. In 1891 W. procured himself to be appointed guardian *ad litem* for the children, and as such brought this action to recover for the use and occupation of the dwelling house. It appeared that soon after the appointment of W.

as general guardian he agreed to allow defendant \$1,000 a year for the maintenance and clothing of the children. No agreement was made for the payment of rent by defendant and no demand was made therefor, until a few days before the commencement of the action, and up to that time W. not only acquiesced in defendant's residence in said house, but consented to and advised it, and defendant's evidence showed and the jury found that it was expressly agreed that no rent was to be charged. *Held*, that the action was not maintainable. *Lamb v. Lamb.* 817

2. *It seems*, that so far as the complaint should be held to be one under the statute (1 R. S. 748, § 2) to recover rent for the use and occupation the action could not be maintained without proof of an agreement, express or implied, to pay rent. *Id.*

#### HABEAS CORPUS.

1. Where a right to restrain the citizen in his personal liberty, or to interfere with his pursuit of a lawful avocation is claimed, to sustain the claim it must appear very clearly not only that the right has been conferred by law, but that the facts exist justifying its exercise. *In re Smith.* 68
2. Under the provision of the charter of the city of Brooklyn (§ 5, tit. 12, chap. 588, Laws of 1888) making it the duty of the health commissioner of that city to take such measures for the preservation of the public health from impending pestilence, and under the provision of the "Public Health Law" (§ 14, chap. 661, Laws of 1893) requiring every local board of health to "guard against the introduction of contagious and infectious diseases," and to "require the isolation of all persons \* \* \* infected with and exposed to such disease," to justify such isolation the fact must exist that the persons are infected with the contagious disease or have been exposed to it. No authority is given by said provisions to said health

commissioner to quarantine any person simply because he refuses to be vaccinated, and to continue him in quarantine until he consents to such vaccination. *Id.*

3. On application for a writ of habeas corpus, the relators' petition alleged that they were imprisoned and restrained of their liberty at their house in Brooklyn, by the order and direction of the commissioner of health; that they had been exposed to no contagion, and were not afflicted with any contagious disease. In the return made by the commissioner to the writ, he alleged that for several months smallpox had been epidemic in the city; that, as he was informed and believes, before ordering the relators to be detained in quarantine, they were engaged in the prosecution of the express delivery business in said city, and in its worst infected district; that the business includes the carrying of household furniture and other articles which may come from infected centres and be infected with the germs of smallpox; that the relators "were unusually exposed to such contagion," and it was "of special importance that they should be vaccinated at once," and that they were detained in quarantine because of their refusal to be vaccinated. *Held*, that a demurrer to the return was properly sustained; that said commissioner had no jurisdiction to make the order. *Id.*

4. An appeal direct to the United States Supreme Court is not authorized either by the United States Revised Statutes or the act of Congress of 1891 (Chap. 517, Laws of 1891), creating Circuit Courts of Appeal, from a decision of a judge of a District Court at Chambers, denying an application for a writ of habeas corpus. *In re Buchanan.* 264

5. Such an appeal, therefore, does not operate as a stay, and where the writ was applied for in case of one imprisoned under judgment of a state court finding him guilty of murder and sentencing him to death, it furnishes no reason for delaying the execution of the sentence. *Id.*

## HEALTH.

1. Under the provisions of the act in relation to public health (§§ 62, 63, chap. 661, Laws of 1893) authorizing the state board of health to cause to be killed any animal affected with tuberculosis, and directing the payment to the owner of "the actual value at the time of destruction of any animal" so killed, to be determined by the Board of Claims, the owner is not entitled to the value of the animal considered as sound and unaffected by disease, but simply its actual value in its diseased condition. *Tappen v. State.* 44
2. Under the provision of the charter of the city of Brooklyn (§ 5, tit. 12, chap. 583, Laws of 1888) making it the duty of the health commissioner of that city to take such measures for the preservation of the public health from impending pestilence, and under the provisions of the "Public Health Law" (§ 14, chap. 661, Laws of 1893) requiring every local board of health to "guard against the introduction of contagious and infectious diseases," and to "require the isolation of all persons \* \* \* infected with and exposed to such disease," to justify such isolation the fact must exist that the persons are infected with the contagious disease or have been exposed to it. No authority is given by said provisions to said health commissioner to quarantine any person simply because he refuses to be vaccinated, and to continue him in quarantine until he consents to such vaccination. *In re Smith.* 68
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### HIGHWAYS.

1. Under the provisions of the "Highway Law" (§ 180, chap. 568, Laws of 1890), fixing the liability for the expenses of the construction and repair of public free bridges as between a town and county, the right of a town to demand contribution from the county when the bridge expenditure of the town is in excess of one-sixth of one per cent of the assessed valuation of its taxable property, is not limited to expenditures for bridges which cross streams forming boundaries of the town, but applies as well to bridges erected wholly within the town. *People ex rel. Root v. Bd. Supers.* 107
2. In proceedings by mandamus to compel the county of Steuben to levy a tax to pay the proportion alleged to be due from it under said act of the expense incurred by the town of Addison for the repair and construction of bridges, it appeared that a portion of the expenditure was for the construction of a bridge in the village of Addison in said town. By the village charter the bridge was excepted from the jurisdiction of the village authorities, and left under the control of the commissioners of highways of the town. It was claimed by the board of supervisors that the bridge was not a town bridge within the statute. *Held*, untenable. *Id.*

### HUSBAND AND WIFE.

1. A meritorious consideration is not sufficient to sustain an executory covenant, executed by a husband to his wife. *In re James.* 78
2. Where, therefore, a husband executed and delivered two bonds to his wife as a gift, *held*, that they were not enforceable after the death of the husband against his estate. *Id.*
3. The bonds were secured by mortgages upon lands in another state. An action of foreclosure was brought in that state during the lifetime of the husband, in which he and his grantees were made parties defendant, and process was served upon them out of the state; he did not appear. A judgment of foreclosure and sale was entered in which the amount due upon the bonds was fixed. After the death of the husband the mortgaged premises were sold under the judgment. Upon settlement of the accounts of the widow as executrix of her husband's will, she presented a claim against the estate for the amount of the bonds less the amount realized on the sale. *Held*, that she was not entitled to an allowance of the claim; but that while said judgment had no effect to create a personal liability upon the bonds, it was conclusive as to the ownership of the mortgages and the right of the mortgagee to have the mortgaged premises sold and the proceeds applied upon the amount represented by the bonds. *Id.*
4. Upon the day of the death of the husband, and while he was in fact dying, a clerk of the firm of which he was a member, who held a power of attorney, authorized to sign checks for the firm, was requested by a messenger from the dying man's home to draw two checks for account of the wife; this the clerk did. The messenger received and caused the checks to be cashed, and deposited the money to the individual credit of the wife. *Held*, that proof of these facts did not justify a finding that the checks were delivered by the husband's authority, or

that the authority of the clerk under the power had been validly called into exercise. *Id.*

5. By the will of the deceased husband he gave to his wife "for her sole use, enjoyment and benefit, during her life, without restraint, deduction or interference in any manner whatsoever," one-half of the income of all his property, "of every kind," during her life; the remainder of the income, and the estate itself, after the death of the wife, he gave to his "legal heirs," subject to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage. *Held* (BARTLETT, J., dissenting), that dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; that the intention of the testator was not to create a technical trust, but that his property should remain in specie for his widow's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it. *Id.*

share and apply the same, or so much thereof as they might deem necessary, to the use of the child for whom the share was intended, and to accumulate the remainder until said child should become of age or sooner die, and upon the coming of age to pay over to him or her the accumulations, and thereafter to apply the whole interest and income to the use of said beneficiary during life; upon the death of a child before or after coming of age to transfer the share to his or her children, and in case of the death of a child leaving no issue to transfer the share to the testator's surviving issue. In an action brought by the executors for a judicial settlement of their accounts, it appeared that the testator left two children, both infants, one of whom died under age, intestate and unmarried. There had been a large accumulation of interest upon the share of the child so dying. *Held*, that until the death of the child the entire interest of her share vested at once when paid in, and only the time of payment over, or enjoyment, was postponed until majority; and so, that the administratrix of the deceased child was entitled to the accumulation. *Smith v. Parsons.*

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2. *It seems*, that where a will so provides for the accumulation of interest on an infant's share during minority, the testator has power to make such disposition thereof, in case of the death of the infant during minority, as he may see fit; and so, may bequeath it to any person, whether a minor or of full age. Such a provision is not violative of the statute providing that accumulations must be for the benefit of minors. *Id.*

## INJURY.

*See NEGLIGENCE.*

## INSURANCE (LIFE).

1. The will of C. directed his executors to divide one-half of his estate into as many equal shares as he should leave children him surviving, to collect the interest on each

H., the father of plaintiffs, at the time of his death held a policy or certificate of insurance on his life

for \$2,000, payable, and which was paid, to his sister, C., the original defendant and the present defendant's testatrix. In an action to recover the amount so paid plaintiffs proved a parol agreement between H. and C., to the effect that when she collected the policy she would expend not to exceed \$500 thereof for his funeral expenses, etc., and would divide the balance equally between plaintiffs, who were his children. *Held*, that the agreement was valid; that C. received the amount of the insurance impressed with the trust created by the agreement, and so that a verdict was properly rendered for the \$1,500. *Hirsh v. Auer.* 13

### JUDGMENT.

1. Plaintiff having recovered a judgment against defendant on the report of a referee for less than the damages demanded in the complaint appealed from so much thereof as awarded damages. Defendant appealed from the whole judgment. The General Term affirmed "the judgment from which plaintiff appeals," and reversed "the judgment from which the defendant appeals," and ordered a new trial, unless plaintiff stipulated to reduce the recovery as specified. Plaintiff failed to stipulate and judgment was entered in accordance with the order. *Held*, that the General Term had no authority to make the order; that if there was error in the judgment on the referee's report, this necessarily required the reversal of the entire judgment and a new trial as to the entire claim or a modification of the judgment. *Nat. Bt. M. Underwriters v. Nat. Bank Republic.* 64
2. A husband executed and delivered two bonds to his wife as a gift. The bonds were secured by mortgages upon lands in another state. An action of foreclosure was brought in that state during the lifetime of the husband, in which he and his grantees were made parties defendant, and process was served upon them out of the state; he did not appear. A judgment

of foreclosure and sale was entered in which the amount due upon the bonds was fixed. After the death of the husband the mortgaged premises were sold under the judgment. Upon settlement of the accounts of the widow as executrix of her husband's will, she presented a claim against the estate for the amount of the bonds less the amount realized on the sale. *Held*, that she was not entitled to an allowance of the claim; but that while said judgment had no effect to create a personal liability upon the bonds, it was conclusive as to the ownership of the mortgages and the right of the mortgagee to have the mortgaged premises sold and the proceeds applied upon the amount represented by the bonds. *In re James.* 78

### JURISDICTION.

1. *It seems*, it was not the purpose of the fourteenth amendment to the United States Constitution, declaring that no state shall "deprive any person of life, liberty or property without due process of law," to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of those courts over crimes and offenses, defined and declared by its laws, and committed within its territorial jurisdiction. *In re Buchanan.* 284
2. *It seems*, also, that while in case of accusation of crime the accused is entitled to an inquiry, a hearing and a judgment before he can be deprived by sentence of his liberty or life, within these limitations what constitutes "due process of law" is to be determined by the state in every case where it can exercise rightful authority, and said amendment confers no jurisdiction upon the Federal courts to supervise the administration by state tribunals of the criminal law of the state, to correct errors committed on trial, or to modify or change their judgments. *Id.*

### JURY.

See TRIAL.

the validity of the claim could not have been litigated in the foreclosure suit, yet, as S. W. P. had conveyed the premises subject to all liens and incumbrances, it was competent for plaintiff to show that the tax title had been extinguished, and this having been proved, the mortgages were existing liens, and the title of the grantee C. W. P. was subject to them; that while the premises were not included in the judgment in the specific performance suit, yet, as part of the proceeds of the sales therein, which were in fact moneys of the mortgagor, were applied in payment of such taxes at the request of S. W. P., he could not claim that the payment was made by himself; and so, that the tax title was preserved. *Id.*

6. Also *held*, that the report of the referee, in which he stated the payment by him of the taxes, pursuant to the order, was competent evidence and sufficient, in the absence of any proof to the contrary, to show the payment even as against the said purchasers B. and S. W. P. *Id.*

7. The lots purchased by S. W. P. at such referee's sale were also included in the conveyance by H. to W., and were re-conveyed with the other land by the latter to the former, and were included in plaintiff's mortgages. They were never released from the purchase-money mortgage, and were included in the agreement. They were directed to be sold by the judgment in this action subject to said mortgage. *Held*, that as to these lots also it was incompetent for the purchaser to use the money of the mortgagor for the purpose of purchasing the tax title and setting it up as paramount to plaintiff's mortgages; and that the provision in the judgment as to their sale was proper. *Id.*

8. McC. died leaving a widow and four children, who were minors, him surviving. By his will he gave to a son, the oldest child, one-fourth of all his residuary estate after payment of debts, and after deducting the widow's dower right, the same to be paid to him in cash on his becoming of age.

The residue was given to the widow for life, the remainder to the three younger children. The widow was appointed executrix with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions" of the will or whenever in her judgment it might be for the best interest of the estate, "applying the proceeds to the benefit of \* \* \* said estate." The real estate was all incumbered. The widow, acting under the power of sale, sold a lot to D. for \$9,000, receiving \$6,000 in cash and D.'s bond for the balance, secured by mortgage on the premises. The money was used in paying incumbrances on the real estate. Subsequently, under an arrangement between the widow and D., the latter deeded back the lot; his mortgage thereon was canceled and the widow executed a mortgage thereon to secure a loan made to pay the son his share, he having come of age. To secure D. the \$6,000 paid by him, the widow executed her bond and to secure it a mortgage, as executrix, on another lot, which recited the power in the will, and that the bond was executed by her, as executrix, under the power. This mortgage was foreclosed and the purchaser on foreclosure sale refused to complete the purchase, claiming the title to be defective, on the ground that the bond was not signed by the executrix in her official capacity. *Held*, untenable. *Roarty v. McDermott.* 296

9. The widow, as executrix and individually, and the three infant children were made parties to the foreclosure suit, and the latter appeared by guardian. The complaint set forth the power of sale and alleged that the mortgage was executed in pursuance of the power. *Held*, that the judgment was conclusive as against all the defendants in that action, that the mortgage was executed under and pursuant to the power and that it was a valid lien. *Id.*

#### FOREIGN CORPORATIONS.

1. *It seems*, that under the provision of the Code of Civil Procedure in



and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is hereinafter disposed of." By other clauses, down to the seventh, separate and distinct devises were made to a devisee named for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before-mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will, it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and a balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth clause. *Held*, that the "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses, and which would go to the residuary legatees; and so, that said residuary

legatees were entitled to the fund. *U. S. Trust Co. N. Y. v. Black.* 1

2. Where a devise contains a clause, in terms a condition, that the devisee pay certain legacies, in the absence of any provision for re-entry or forfeiture, or of anything to support an inference that the testator intended the estate to depend upon performance of the requirement, the words used will be held to import a covenant, not a condition. *Cunningham v. Parker.* 29
3. D., by his will, after directing the payment of his debts by his executor, and after giving various legacies, devised and bequeathed all the residue of his estate, real and personal, to his son A., "on the condition and proviso that he pay" the said legacies within four years after the death of the testator, and the real estate so devised to A. was charged with the payment of the same. A. was appointed executor; he accepted the devise and went into possession of the real estate, but did not pay the legacies within the four years. At the death of D. his personality was insufficient to pay his debts. In an action brought by creditors of the decedent under the Code of Civil Procedure (§ 1844, *et seq.*) to reach and apply the real estate to the payment of their debts, *held*, that the failure to pay the legacies did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the land so devised to him. *Id.*
4. Unless a residuary bequest is circumscribed by clear expressions and the title of the residuary legatee narrowed by words of unmistakable import, it will, to prevent intestacy, be construed so as to perform the office intended, *i. e.*, to dispose of all the residuary estate. *In re Miner.* 121
5. The holographic will of M., after various devises and bequests, among them a bequest to his wife of all his "household goods, furniture and fixtures and effects," contained a direction to his executors to sell and convey any and all

of his real estate, not otherwise disposed of, and convert the same into personalty. The will then provided that after the aforementioned payments shall be made out of the avails of the real and personal estate the balance shall form part of the residuary estate. It was also provided that in case of failure of one of the bequests it shall form part of the residuary estate. Then followed a clause commencing as follows: "All the rest and residue of my estate both real and personal not heretofore disposed of I give, bequeath and devise as follows. All my household goods furniture and effects after the decease of myself and wife to." Following this were the names of the beneficiaries, three in number, and the method of distribution. The testator left a large estate; he had no children; three beneficiaries had been taken into his family at an early age, and had grown up and were recognized as members of his family. *Held*, that the general plan of the will indicated the testator's intent to create a residuary estate, and to effectually dispose of the whole thereof; and so, that the general words of gift carried to the three persons named all of the residuary estate, notwithstanding the presence of the qualifying words, "as follows;" that the testator's intent in specifying the furniture, etc., which had, by the words of a previous clause, been absolutely given to his wife, was simply to limit that gift to a life estate. *Id.*

6. A contingency attached to a legacy, which will render it void as an unlawful suspension of the power of alienation, must be one that relates to the person who shall take, and who may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it may happen that there is no one who can alienate within that time. *Sawyer v. Cubby*. 192

7. The will of S. contained a legacy payable to C. in case he paid during the testator's lifetime all assessments, dues and premiums upon any insurance on his life, taken for the benefit of, and payable to, A., his adopted son, and

in case such insurance or some part thereof should be actually paid to A. one year from the testator's death. The testator's residuary estate he gave to his executors in trust to pay the income thereof to A. until he arrived at the age of thirty-five years, and then to pay over to him the principal. In an action for the construction of this clause, *held*, that the bequest to C., although future and contingent, vested as a right upon the testator's death, and so was alienable by him; that while the trust covered the entire residue except the contingent estate bequeathed to C., and there was a suspension of the power of alienation during the existence of the trust, that the suspension was simply for the life of A. or for a shorter period; and that, therefore, there was no unlawful suspension of the power of alienation, and that the bequest was valid. *Id.*

#### LETTERS OF ADMINISTRATION.

*See* EXECUTORS AND ADMINISTRATORS.

#### LIMITATIONS (STATUTE OF).

1. An executor can neither by his promise or acknowledgment, oral or written, revive a debt against the estate of his testator barred by the Statute of Limitations. *Schutz v. Morette*. 137

2. An acknowledgment of a debt by an executor will not, in the absence of an express promise to pay, take the case out of the statute. *Id.*

3. The complaint in an action against an executor alleged, in substance, that plaintiff presented a duly verified claim, which was set forth in full, against the decedent's estate, to defendant, who acknowledged its receipt, and although he has had a reasonable opportunity to examine into its validity and fairness he has not disputed or rejected the same, but refuses to pay it. The claim on its face, in connection with other facts aver-

red in the complaint, showed presumptively that a part at least was barred by the Statute of Limitations at the time of the death of the testatrix. Upon demurrer to the complaint, *held*, that it did not state a cause of action. *Id.*

### MANDAMUS.

1. A writ of mandamus will not be granted upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office. *It seems*, that the appropriate remedy in such case is by quo warranto. *People ex rel. Lewis v. Brush.* 60

2. Where, on motion for a peremptory writ of mandamus, opposing affidavits are read which are in conflict with the averments of the moving affidavits, the question as to the right to the writ must be determined upon the assumption that the averments in the opposing affidavits are true. *Id.*

3. An application for a peremptory writ of mandamus requiring defendant B. to surrender to relator the office of mayor of the city of Mt. V., and that the other defendants, composing the common council, recognize him as mayor, was made upon the relator's affidavit, which alleged, in substance, that at the election held in 1894, he received a majority of the votes lawfully cast for mayor, and that on the next day at a regular meeting of the common council the votes were duly canvassed and he was declared elected; also, upon the certificate of the city clerk, that a resolution to that effect was adopted by the common council, and the affidavit of B. to the effect that he conceded the relator was duly elected, and that there was a valid canvass. An affidavit of one of the defendants was read in opposition, which denied that the relator received a plurality of all the votes, or that it so appeared from the lawful certificates of the

inspectors of election on file in the office of the city clerk, or that there was a regular meeting of the common council at which there was a canvass of the votes for mayor. *Held*, that the application was properly denied; that a serious question was raised by the opposing affidavit, as to the relator's title to the office; and so, that a mandamus was not his proper remedy. *Id.*

### MARRIAGE.

Plaintiff, an unmarried woman, entered into the service of W., defendant's intestate, as a house-keeper, and to render such other services as should be required of her, under an agreement that she was to be compensated for her services by certain specified provisions in his will. Plaintiff having received and accepted an offer of marriage, notified W. thereof, stating to him her willingness to carry out and continue the performance of her contract, and that her proposed husband was entirely willing she should do so. W. refused to receive her services as a married woman, and discharged her soon after she married. In an action upon the contract, *held*, that the mere fact of a contemplated marriage, or the marriage itself, did not necessarily as matter of law disqualify plaintiff from rendering the services contemplated in the agreement; and so, that the question as to whether the marriage afforded ground for plaintiff's discharge was properly submitted to the jury. *Edgcomb v. Buckhout.* 332

### MASTER AND SERVANT.

Defendant operated a single-track street railroad, using one-horse cars in charge of a single employee, who acted as conductor and driver. The cars passed each other by means of switches. The rear platform of each car, where passengers enter, is two feet narrower than the distance between the rails; at the rear of this platform is a dash half its width and about thirty inches high. The

brake is in front of the driver's platform. Two cars met in a space between two switches; in order to take one of them back to a switch the horse was unhitched and the driver called upon plaintiff, a boy about eleven years old, to take the reins; he drove the horse around to the rear of the car, and after the whiffletree was attached took his place on the rear platform and by direction of the driver started the horse, the driver taking his place on the front platform to manage the brake. Some boys in the car, frightened by the driver, who ordered them to get off the car, and hurrying to get off from the platform on which plaintiff was standing, pushed him therefrom and he was injured. In an action to recover damages the only specification of negligence in the complaint was that the platform was unsafe upon which to place a boy of plaintiff's age to perform the duties imposed on him, and upon the trial the question of negligence was confined to this point. *Held*, that the emergency authorized the driver to employ outside assistance; but that there was no reasonable ground for holding that the rear platform was an unsafe place to put the plaintiff, or that there was any negligence in placing him upon it to drive the horse; and so, that the question was improperly submitted to the jury. *Marks v. Rochester Ry. Co.* 181

#### MEASURE OF DAMAGES.

*See* DAMAGES.

#### MISREPRESENTATION.

*See* SALES.

#### MORTGAGE.

1. In an action brought by creditors of a decedent to reach and apply real estate to the payment of debts, it appeared that A., his devisee, before the commencement, procured a loan from H., and gave to him a mortgage upon the land to

secure the same. H. took the same in good faith and without actual notice of unpaid debts. *Held*, that the lien of the mortgage was valid, and as between the holders thereof and the creditors the former were entitled to a preference in the payment of the mortgage out of the proceeds of the sale of the land. *Cunningham v. Parker.* 29

2. Bonds given by a husband to his wife were secured by mortgages upon lands in another state. An action of foreclosure was brought in that state during the lifetime of the husband, in which he and his grantees were made parties defendant, and process was served upon them out of the state; he did not appear. A judgment of foreclosure and sale was entered in which the amount due upon the bonds was fixed. After the death of the husband the mortgaged premises were sold under the judgment. Upon settlement of the accounts of the widow as executrix of her husband's will, she presented a claim against the estate for the amount of the bonds, less the amount realized on the sale. *Held*, that she was not entitled to an allowance of the claim; but that while said judgment had no effect to create a personal liability upon the bonds, it was conclusive as to the ownership of the mortgages and the right of the mortgagee to have the mortgaged premises sold and the proceeds applied upon the amount represented by the bonds. *In re James.* 78

3. In October, 1870, H. was the owner of a tract of land subject to a purchase-money mortgage; he conveyed a portion thereof to a seminary, and C., the mortgagee, before the conveyance, executed to H. a release, absolute in its terms, of that portion from the lien of the mortgage. The deed of H. stated that the land was granted on the condition that it should be kept and used as a theological seminary; the grantee covenanted that it would, within five years, erect buildings on the premises for that purpose, and, in case of default, would, upon request, re-convey to H. In April,

1871, H., his wife and C. entered into a contract by which it was agreed that the land covered by said mortgage, except that portion to which the seminary "may retain title," and also other lands owned by H. and wife, should be sold off in lots and the purchase money divided between the parties in specified proportions. In June, 1871, H. conveyed certain other portions of the tract to W., which was also released by C. from the purchase-money mortgage. In May, 1873, the seminary re-conveyed to H. the land so conveyed to it by him, and in June, 1879, W. re-conveyed to H. the portion so conveyed to him. Thereafter H. and wife executed to M., the original plaintiff herein, two mortgages on the portions so re-conveyed to him by the seminary and W. In an action to foreclose said mortgages defendants claimed that by reason of the covenant for re-conveyance in the deed to the seminary the land conveyed, upon being re-conveyed to H., became subject to the agreement and subject to be sold under its provisions, and although M. had no actual notice of the agreement that the record thereof was constructive notice; and so, that she took her mortgage subject to the rights of third parties provided for in the agreement. *Held*, untenable. *Oliphant v. Burns*. 218

4. In July, 1880, an action was brought by the executors of C. against H. and others to enforce specific performance of the said agreement. The complaint, in describing the property to be affected, excluded the parcels sold to the seminary and to W. M. was made one of the defendants. She appeared and set up the releases, and thereupon, by consent, the complaint was dismissed as to her. The judgment therein, to which none of the remaining defendants appeared to have raised any objection, directed the sale of the seminary parcel with the land described in the complaint. After the commencement of the action, but before entry of judgment therein, one of plaintiffs' mortgages was executed. *Held*, that

the *lis pendens* in that action was no notice to M., as the complaint excluded the seminary parcel, and any agreement between third parties to include it therein and in the judgment was ineffectual to affect her rights under her mortgage, and, therefore, so far as she was concerned, there was a legal unincumbered title in H. at the time he executed the mortgages in question. *Id*.

5. Also, *held*, that it was not necessary for the complaint to allege or for plaintiff to prove as part of her case that the mortgages were given for value; that while it might have been her duty to do this, after proof of the agreement by defendant, no objection having been taken on the trial because of failure to make this proof, the question could not be presented on appeal. *Id*.
6. Pursuant to the judgment in the action for specific performance the seminary tract was sold to defendant B. By the judgment the referee appointed to sell was directed to pay all liens for taxes or assessments. Upon petition of the referee, and after hearing and upon request of B. and other purchasers, but without notice to the plaintiff in that action or to H. or M., an order was made directing the referee to pay out of the purchase moneys a sum which had been agreed upon between the purchasers and the town for taxes on the property included in the judgment, and also upon that conveyed by H. to W. and re-conveyed by him to H. By the order the purchasers, on proof of payment of the taxes, were allowed to retain the tax leases, certificates and assignments to them by the town, for the protection of their title. Upon the trial of this action B. claimed title and possession under the tax leases; that their validity could not be determined in this action, and that the same were paramount to the mortgages. *Held*, untenable; that while it was to be presumed that the seminary parcel was inserted in the judgment and sold with the consent of the parties to the action, the premises were in law sold subject to



canceled and the widow executed a mortgage thereon to secure a loan made to pay the son his share, he having come of age. To secure D. the \$6,000 paid by him, the widow executed her bond and to secure it a mortgage, as executrix, on another lot, which recited the power in the will, and that the bond was executed by her, as executrix, under the power. This mortgage was foreclosed and the purchaser on foreclosure sale refused to complete the purchase, claiming the title to be defective, on the ground that the bond was not signed by the executrix in her official capacity. *Held*, untenable. *Roarty v. McDermott*. 296

11. The widow, as executrix and individually, and the three infant children were made parties to the foreclosure suit, and the latter appeared by guardian. The complaint set forth the power of sale and alleged that the mortgage was executed in pursuance of the power. *Held*, that the judgment was conclusive as against all the defendants in that action, that the mortgage was executed under and pursuant to the power and that it was a valid lien. *Id*.

See, also, *Blazy v. McLean*. 390

## MURDER.

See *People v. Leach*. 392

## NEGLIGENCE.

1. In an action to recover damages for injuries sustained by plaintiff, an employee of defendant, alleged to have been caused by its negligent omission to construct a fire escape sufficient to meet the requirements of the act directing the construction of fire escapes on the outside of factories like that of the defendant (Chap. 409, Laws of 1886, as amended by chap. 462, Laws of 1887), these facts appeared: There was a door in the rear of the factory opening on the first floor; this was three feet above the court yard, and beneath this was an area giving access to the basement. To reach this door

three steps leading to a platform in front of the door had originally been erected over the area, forming a covering to it. The platform and steps were supported by iron stanchions. There was a fire escape ladder directly over the platform, its lowest round ten feet above it. Prior to the fire this entrance to the factory had been closed and the steps leading to the platform; also, as plaintiff's evidence tended to show, one plank of the platform had been removed for the purpose of putting in a chute running from the court yard to the bottom of the area, leaving the iron stanchions exposed and so much of the area uncovered. The evidence authorized a finding that the portion of the platform left was so narrow as to render it impossible for a person dropping vertically from the ladder to land upon it. The factory caught fire, and plaintiff, to escape from the burning building, went down the ladder, and when his feet were on the bottom round, became unconscious and dropped therefrom. When he recovered consciousness he found himself lying across the chute. The court charged that if plaintiff dropped upon the platform and was there injured he could not recover. *Held*, that the evidence justified a finding that plaintiff did not drop upon the platform, but upon the stanchions or chute; that the jury properly found defendant guilty of negligence in leaving the stanchions and chute in the condition they were and the area but partially covered by the narrow platform; and so, that it had failed to furnish a proper fire escape within the meaning of the statute. *Johnson v. S. G. & L. Co*. 152

2. Defendant operated a single-track street railroad, using one-horse cars in charge of a single employee, who acted as conductor and driver. The cars passed each other by means of switches. The rear platform of each car, where passengers enter, is two feet narrower than the distance between the rails; at the rear of this platform is a dash half its width and about thirty inches high. The brake is in front of the driver's

platform. Two cars met in a space between two switches; in order to take one of them back to a switch the horse was unhitched and the driver called upon plaintiff, a boy about eleven years old, to take the reins; he drove the horse around to the rear of the car, and after the whiffletree was attached took his place on the rear platform, and by direction of the driver started the horse, the driver taking his place on the front platform to manage the brake. Some boys in the car, frightened by the driver, who ordered them to get off the car, and hurrying to get off from the platform on which plaintiff was standing, pushed him therefrom and he was injured. In an action to recover damages the only specification of negligence in the complaint was that the platform was unsafe upon which to place a boy of plaintiff's age to perform the duties imposed on him, and upon the trial the question of negligence was confined to this point. *Held*, that the emergency authorized the driver to employ outside assistance; but that there was no reasonable ground for holding that the rear platform was an unsafe place to put the plaintiff, or that there was any negligence in placing him upon it to drive the horse; and so, that the question was improperly submitted to the jury. *Marks v. Rochester Rwy. Co.* 181

See, also, *Geoghegan v. Atlas Steamship Co.* 369  
*Burns v. Matthews.* 386

#### NEGOTIABLE PAPER.

See *BILLS, NOTES, CHECKS.*

#### NEW TRIAL.

1. Plaintiff having recovered a judgment against defendant on the report of a referee for less than the damages demanded in the complaint, appealed from so much thereof as awarded damages. Defendant appealed from the whole judgment. The General Term affirmed "the judg-

ment from which plaintiff appeals," and reversed "the judgment from which the defendant appeals," and ordered a new trial, unless plaintiff stipulated to reduce the recovery as specified. Plaintiff failed to stipulate and judgment was entered in accordance with the order. *Held*, that the General Term had no authority to make the order; that if there was error in the judgment on the referee's report, this necessarily required the reversal of the entire judgment and a new trial as to the entire claim or a modification of the judgment. *Nat. Bd. M. Underwriters v. Nat. Bank Republic.* 64

2. The General Term, in reversing an order granting a new trial, held that the verdict could stand upon the ground of negligence of a driver in driving boys from a car when in motion. *Held*, error; that as this was not presented to the jury, and they were not permitted to consider it, the verdict could not be sustained on that ground; that if sustainable it must be sustained on the ground upon which the case was submitted. *Marks v. Rochester Rwy. Co.* 181

#### NEW YORK (CITY OF).

1. In 1867 defendant granted to plaintiff the right to operate a ferry, and executed to it a lease of certain slips and bulkheads for the term of ten years, by the terms of which plaintiff was to erect the necessary ferry fixtures and to yield them up to defendant at the end of the term, subject, however, to the right reserved to such a lessee by the provision of the city charter of 1857 (§ 41, chap. 446, Laws of 1857), requiring all persons acquiring any ferry lease to purchase at a fair valuation the boats, buildings and other property of a former lessee necessary for the purposes of such ferry grant. Subsequently, by agreement between the parties, plaintiff surrendered the premises covered by the lease and accepted in lieu thereof a lease of other premises for the balance of the original



term; in and by which defendant covenanted that in case a new lease should not be granted to plaintiff, defendant would pay for the buildings and ferry fixtures erected by plaintiff on the demised premises. "in the manner provided for in and by the said first-mentioned recited indenture or lease." At the termination of this lease plaintiff demanded a renewal at the same rental, which defendant refused, and a lease was executed to another ferry company at an increased rental. In an action upon said covenant to recover the value of the buildings and ferry fixtures erected by plaintiff, *held*, that the rights of the parties were not affected by the revised charter of 1870 (chap. 137, Laws of 1870), and that defendant was under no obligation to renew the lease at the same rental as provided for by the old lease. *N. Y. & B. F. Co. v. Mayor, etc., N. Y.* 145

2. It appeared that the ferry company to whom the new lease was executed was organized by plaintiff's officers for its benefit and that of its stockholders. *Held*, that in effect the new lease was issued to plaintiff, it having become its own successor under a new name; and so, it had no cause of action. *Id.*

3. The provision of the New York Consolidation Act (§ 879, chap. 410, Laws of 1882) declaring that no action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city or to remove a cloud on title, but that the property owners shall be confined to the remedies given, is not limited to actions wherein it is sought simply to vacate assessments or to remove clouds on title, but prohibits as well an action to restrain the creation of a cloud on title by means of a sale by virtue of an assessment and the giving of a lease consequent on such sale on the ground that the assessment is void. The relief sought in such a case is, in substance, a vacation of the assessment. *Scudder v. Mayor, etc., N. Y.* 245

4. The section was intended to confine property owners in all cases of alleged void assessments to the remedies provided for in the act. *Id.*

5. Under the provisions of the Revised Statutes in reference to the assessment for taxation of real property (1 R. S. 393, § 17), which requires the assessors to assess the same at its "just and full value as they would appraise the same in payment of a just debt due from a solvent debtor," and also under the provision of the New York Consolidation Act (§ 814, chap. 410, Laws of 1882), which requires the assessment to be "at the sum for which such property under ordinary circumstances would sell," it is the duty of the assessors to assess the property at its actual value. *People ex rel. Manh. R. Co. v. Barker.* 304

6. As the commissioners of taxes and assessments in the city of New York are sworn officers, in the absence of evidence to the contrary, it is to be presumed that they have performed their duty in making such an assessment. *Id.*

*See* RECOGNIZANCE.

## NOTICE.

1. In October, 1870, H. was the owner of a tract of land subject to a purchase-money mortgage; he conveyed a portion thereof to a seminary, and C., the mortgagee, before the conveyance, executed to H. a release, absolute in its terms, of that portion from the lien of the mortgage. The deed of H. stated that the land was granted on the condition that it should be kept and used as a theological seminary; the grantee covenanted that it would, within five years, erect buildings on the premises for that purpose, and, in case of default, would, upon request, re-convey to H. In April, 1871, H., his wife and C. entered into a contract by which it was agreed that the land covered by said mortgage, except that portion to which the seminary "may

retain title," and also other lands owned by H. and wife, should be sold off in lots and the purchase money divided between the parties in specified proportions. In June, 1871, H. conveyed certain other portions of the tract to W., which was also released by C. from the purchase-money mortgage. In May, 1873, the seminary re-conveyed to H. the land so conveyed to it by him, and in June, 1879, W. re-conveyed to H. the portion so conveyed to him. Thereafter H. and wife executed to M., the original plaintiff herein, two mortgages on the portions so re-conveyed to him by the seminary and W. In an action to foreclose said mortgages defendants claimed that by reason of the covenant for re-conveyance in the deed to the seminary the land conveyed, upon being re-conveyed to H., became subject to the agreement and subject to be sold under its provisions, and although M. had no actual notice of the agreement that the record thereof was constructive notice; and so, that she took her mortgage subject to the rights of third parties provided for in the agreement. *Held*, untenable. *Olyphant v. Burns*. 218

2. In July, 1880, an action was brought by the executors of C. against H. and others to enforce specific performance of the said agreement. The complaint, in describing the property to be affected, excluded the parcels sold to the seminary and to W. M. was made one of the defendants. She appeared and set up the releases, and thereupon, by consent, the complaint was dismissed as to her. The judgment therein, to which none of the remaining defendants appeared to have raised any objection, directed the sale of the seminary parcel with the land described in the complaint. After the commencement of the action, but before entry of judgment therein, one of plaintiffs' mortgages was executed. *Held*, that the *lis pendens* in that action was no notice to M., as the complaint excluded the seminary parcel, and any agreement between third parties to include it therein and in the

judgment was ineffectual to affect her rights under her mortgage, and, therefore, so far as she was concerned, there was a legal unincumbered title in H. at the time he executed the mortgages in question. *Id.*

## OFFICERS.

*See* PUBLIC OFFICERS.

## PARTNERSHIP.

*See* WILL.

## PASS.

1. A person appointed to the office of railroad policeman under the "Railroad Law" (§ 58, chap. 565, Laws of 1891) is a public officer within the meaning of the constitutional provision (Art. 13, § 5) prohibiting a public officer from receiving for his own use and benefit a free pass from any corporation. *Dempsey v. N. Y. C. & H. R. R. Co.* 290
2. Where, however, prior to the adoption of the Constitution plaintiff entered into a contract with defendant, a railroad corporation, by which he agreed to render services for it in preventing depredations upon its property by thieves and trespassers, he to receive for his services a fixed salary and also an annual pass for transportation over its road and that of another railroad company, which could be used by him whether engaged in the business of the corporation or in his own private affairs, and to carry out his contract plaintiff procured an appointment to said office of railroad policeman, qualified as such, and entered upon the performance of his duties, *held*, that the pass to which he was entitled under the contract was not a "free pass" within the meaning of said constitutional provision; that the contract, therefore, was not in conflict with that provision; and that an action was maintainable to compel specific performance of the contract by defendant. *Id.*

PERSONAL PROPERTY.

In assessing personal property assessors are entitled to exercise more latitude than is permitted in assessing real property. *People ex rel. Manh. R. Co. v. Barker.* 304

PLEADING.

1. A cause of action upon an account stated does not rest upon the obligation originally created when the items of indebtedness arose, but upon the agreement of the parties, made after the transactions constituting the account, that a certain balance remains due from one to the other, and the promise of the former to pay this balance; and so, it is unnecessary in an action upon an account stated to set forth in the complaint the subject-matter of the original debt. *Schutz v. Morette.* 137

2. The complaint in an action against an executor alleged, in substance, that plaintiff presented a duly verified claim, which was set forth in full, against the decedent's estate, to defendant, who acknowledged its receipt, and although he has had a reasonable opportunity to examine into its validity and fairness he has not disputed or rejected the same, but refuses to pay it. The claim on its face, in connection with other facts averred in the complaint, showed presumptively that a part at least was barred by the Statute of Limitations at the time of the death of the testatrix. Upon demurrer to the complaint, *held*, that it did not state a cause of action. *Id.*

POWERS.

By the will of B. the executors were empowered to sell any and all of his real estate when in their judgment they might deem it for the best interests of the estate. The executors sold the real estate; they paid, in discharge of the testator's debts, a sum in excess of that realized from the personality. In proceedings for a final accounting by the executors, *held*, that before distributing the proceeds of

the sale among the residuary devisees, they were entitled to reimburse themselves therefrom for the sum so paid in excess of the personality, and were entitled to a credit for that sum, and this, without regard to the question as to whether the power of sale was given for the purpose of paying debts. *In re Bolton.* 257

PRACTICE.

1. Plaintiff having recovered a judgment against defendant on the report of a referee for less than the damages demanded in the complaint appealed from so much thereof as awarded damages. Defendant appealed from the whole judgment. The General Term affirmed "the judgment from which plaintiff appeals," and reversed "the judgment from which the defendant appeals," and ordered a new trial, unless plaintiff stipulated to reduce the recovery as specified. Plaintiff failed to stipulate and judgment was entered in accordance with the order. *Held*, that the General Term had no authority to make the order; that if there was error in the judgment on the referee's report, this necessarily required the reversal of the entire judgment and a new trial as to the entire claim or a modification of the judgment. *Nat. Bd. M. Underwriters v. Nat. Bank Republic.* 64

2. After entry of judgment in an equity action on findings of fact and conclusions of law, the Special Term, which tried the action, has no power on motion for a re-settlement of the findings and conclusions to make amendments therein, altering the decision on the merits and changing the substantial rights of the parties. *Heath v. N. Y. B. L. B. Co.* 260

3. The authority given to the court by the Code of Civil Procedure (§ 723) to make amendments is confined to such as do not affect the substantial rights of the parties. *Id.*

4. An appeal direct to the United States Supreme Court is not au-

thorized either by the United States Revised Statutes or the act of Congress of 1891 (Chap. 517, Laws of 1891), creating Circuit Courts of Appeal, from a decision of a judge of a District Court at Chambers, denying an application for a writ of habeas corpus. *In re Buchanan.* 264

5. Such an appeal, therefore, does not operate as a stay, and where the writ was applied for in case of one imprisoned under judgment of a state court finding him guilty of murder and sentencing him to death, it furnishes no reason for delaying the execution of the sentence. *Id.*

6. A reprieve to a day certain granted by the governor in a capital case, which day is beyond the week in which, by order of the court, the execution was to take place, does not render it necessary to have the prisoner brought before the court to have the time of execution again fixed, but authorizes the execution of the sentence on the day on which the reprieve terminates. *Id.*

7. The distinction between a reprieve and a suspension of sentence pointed out. *Id.*

8. The provisions of the Code of Criminal Procedure (§§ 503, 504) providing that when a person sentenced to death has not, for any reasons save those specified, been executed pursuant to the sentence at the time specified, and the judgment inflicting the sentence stands in full force, such person shall be brought before one of the courts specified and the day for the execution of the sentence again fixed, does not apply in the case of a reprieve, unless the day fixed thereby has passed and the sentence has not been executed, in which case the provisions are applicable. *Id.*

#### PRESUMPTIONS.

1. While a voter may change his legal residence into a new district in spite of the fact that he becomes a student in an institution

of learning therein, presumably his occupation of rooms in the institution is only during the prescribed period of study, and so, such occupation is no evidence of a change of residence, but the facts to establish the change must be wholly independent of his presence in the new district as a student, and, *it seems*, should be clear and convincing to overcome the natural presumption. *In re Goodman.* 284

2. *It seems*, also, that a verified statement of the voter of a mental intention to change his residence is not, unless fortified by consistent acts, sufficient to overcome such presumption. *Id.*

#### PRINCIPAL AND SURETY.

*See SURETY.*

#### PROCEDURE.

*See PRACTICE.*

#### PROOF.

*See EVIDENCE.*

#### PROPERTY.

*See PERSONAL PROPERTY.*  
*REAL PROPERTY.*

#### PUBLIC OFFICERS.

1. A writ of mandamus will not be granted upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office. *It seems*, that the appropriate remedy in such case is by quo warranto. *People ex rel. Lewis v. Brush.* 60

2. A person appointed to the office of railroad policeman under the "Railroad Law" (§ 58, chap. 565, Laws of 1891) is a public officer

within the meaning of the constitutional provision (Art. 13, § 5) prohibiting a public officer from receiving for his own use and benefit a free pass from any corporation. *Dempsey v. N. Y. C. & H. R. R. Co.* 290

3. Where, however, prior to the adoption of the Constitution plaintiff entered into a contract with defendant, a railroad corporation, by which he agreed to render services for it in preventing depredations upon its property by thieves and trespassers, he to receive for his services a fixed salary and also an annual pass for transportation over its road and that of another railroad company, which could be used by him whether engaged in the business of the corporation or in his own private affairs, and to carry out his contract plaintiff procured an appointment to said office of railroad policeman, qualified as such, and entered upon the performance of his duties, *held*, that the pass to which he was entitled under the contract was not a "free pass" within the meaning of said constitutional provision; that the contract, therefore, was not in conflict with that provision; and that an action was maintainable to compel specific performance of the contract by defendant. *Id.*

4. As the commissioners of taxes and assessments in the city of New York are sworn officers, in the absence of evidence to the contrary, it is to be presumed that they have performed their duty in making an assessment. *People ex rel. Manh. R. Co. v. Barker.* 304

*See* QUO WARRANTO.

#### QUO WARRANTO.

1. A writ of a mandamus will not be granted upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office. *It seems*, that the appropriate remedy in such

case is by quo warranto. *People ex rel. Lewis v. Brush.* 60

2. An application for a peremptory writ of mandamus requiring defendant B. to surrender to relator the office of mayor of the city of Mt. V., and that the other defendants, composing the common council, recognize him as mayor, was made upon the relator's affidavit, which alleged, in substance, that at the election held in 1894, he received a majority of the votes lawfully cast for mayor, and that on the next day at a regular meeting of the common council the votes were duly canvassed and he was declared elected; also, upon the certificate of the city clerk, that a resolution to that effect was adopted by the common council, and the affidavit of B. to the effect that he conceded the relator was duly elected, and that there was a valid canvass. An affidavit of one of the defendants was read in opposition, which denied that the relator received a plurality of all the votes, or that it so appeared from the lawful certificates of the inspectors of election on file in the office of the city clerk, or that there was a regular meeting of the common council at which there was a canvass of the votes for mayor. *Held*, that the application was properly denied; that a serious question was raised by the opposing affidavit, as to the relator's title to the office; and so, that a mandamus was not his proper remedy. *Id.*

#### RAILROADS.

1. A person appointed to the office of railroad policeman under the "Railroad Law" (§ 58, chap. 565, Laws of 1891) is a public officer within the meaning of the constitutional provision (Art. 13, § 5) prohibiting a public officer from receiving for his own use and benefit a free pass from any corporation. *Dempsey v. N. Y. C. & H. R. R. Co.* 290
2. Where, however, prior to the adoption of the Constitution plaintiff entered into a contract with defendant, a railroad corporation,

- M.'s mortgages, and the duty of paying the taxes rested upon the mortgagor, which duty was discharged by the payment out of the proceeds of sale; and so, although by the order the purchasers were allowed to take assignments, this did not alter the character of the payment, and the taxes and tax titles were thereby extinguished. *Id.*
7. Subsequent to the re-conveyance to H. of the lots conveyed by him to W., H. conveyed them to another, and on the same day the grantee conveyed them to the wife of H., in whose name the title stood when the second mortgage to M. was executed; she died intestate, and through conveyances from her husband and heirs S. W. P. acquired title; he, after the payment of the taxes as above stated, conveyed the premises to his son, defendant C. W. P., "subject to all liens and incumbrances." S. W. P. purchased certain lots at the referee's sale and joined with B. in the request for the order as to payment of taxes. *Held*, that while, if S. W. P. had taken possession under his tax title, he might have set up such title and claimed it paramount to the mortgages, and while the validity of the claim could not have been litigated in the foreclosure suit, yet, as S. W. P. had conveyed the premises subject to all liens and incumbrances, it was competent for plaintiff to show that the tax title had been extinguished, and this having been proved, the mortgages were existing liens, and the title of the grantee C. W. P. was subject to them; that while the premises were not included in the judgment in the specific performance suit, yet, as part of the proceeds of the sales therein, which were in fact moneys of the mortgagor, were applied in payment of such taxes at the request of S. W. P., he could not claim that the payment was made by himself; and so, that the tax title was preserved. *Id.*
8. Also *held*, that the report of the referee, in which he stated the payment by him of the taxes, pursuant to the order, was competent evidence and sufficient, in the absence of any proof to the contrary, to show the payment even as against the said purchasers, B. and S. W. P. *Id.*
9. The lots purchased by S. W. P. at such referee's sale were also included in the conveyance by H. to W., and were re-conveyed with the other land by the latter to the former, and were included in plaintiff's mortgages. They were never released from the purchase-money mortgage and were included in the agreement. They were directed to be sold by the judgment in this action subject to said mortgage. *Held*, that as to these lots also it was incompetent for the purchaser to use the money of the mortgagor for the purpose of purchasing the tax title and setting it up as paramount to plaintiff's mortgages; and that the provision in the judgment as to their sale was proper. *Id.*
10. McC. died leaving a widow and four children, who were minors, him surviving. By his will he gave to a son, the oldest child, one-fourth of all his residuary estate after payment of debts, and after deducting the widow's dower right, the same to be paid to him in cash on his becoming of age. The residue was given to the widow for life, the remainder to the three younger children. The widow was appointed executrix with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions" of the will or whenever in her judgment it might be for the best interest of the estate, "applying the proceeds to the benefit of \* \* \* said estate." The real estate was all incumbered. The widow, acting under the power of sale, sold a lot to D. for \$9,000, receiving \$6,000 in cash and D.'s bond for the balance, secured by mortgage on the premises. The money was used in paying incumbrances on the real estate. Subsequently, under an arrangement between the widow and D., the latter deeded back the lot; his mortgage thereon was

canceled and the widow executed a mortgage thereon to secure a loan made to pay the son his share, he having come of age. To secure D. the \$6,000 paid by him, the widow executed her bond and to secure it a mortgage, as executrix, on another lot, which recited the power in the will, and that the bond was executed by her, as executrix, under the power. This mortgage was foreclosed and the purchaser on foreclosure sale refused to complete the purchase, claiming the title to be defective, on the ground that the bond was not signed by the executrix in her official capacity. *Held*, untenable. *Rorty v. McDermott*. 296

11. The widow, as executrix and individually, and the three infant children were made parties to the foreclosure suit, and the latter appeared by guardian. The complaint set forth the power of sale and alleged that the mortgage was executed in pursuance of the power. *Held*, that the judgment was conclusive as against all the defendants in that action, that the mortgage was executed under and pursuant to the power and that it was a valid lien. *Id*.

See, also, *Blazy v. McLean*. 890

## MURDER.

See *People v. Leach*. 892

## NEGLIGENCE.

1. In an action to recover damages for injuries sustained by plaintiff, an employee of defendant, alleged to have been caused by its negligent omission to construct a fire escape sufficient to meet the requirements of the act directing the construction of fire escapes on the outside of factories like that of the defendant (Chap. 409, Laws of 1886, as amended by chap. 462, Laws of 1887), these facts appeared: There was a door in the rear of the factory opening on the first floor; this was three feet above the court yard, and beneath this was an area giving access to the basement. To reach this door

three steps leading to a platform in front of the door had originally been erected over the area, forming a covering to it. The platform and steps were supported by iron stanchions. There was a fire escape ladder directly over the platform, its lowest round ten feet above it. Prior to the fire this entrance to the factory had been closed and the steps leading to the platform; also, as plaintiff's evidence tended to show, one plank of the platform had been removed for the purpose of putting in a chute running from the court yard to the bottom of the area, leaving the iron stanchions exposed and so much of the area uncovered. The evidence authorized a finding that the portion of the platform left was so narrow as to render it impossible for a person dropping vertically from the ladder to land upon it. The factory caught fire, and plaintiff, to escape from the burning building, went down the ladder, and when his feet were on the bottom round, became unconscious and dropped therefrom. When he recovered consciousness he found himself lying across the chute. The court charged that if plaintiff dropped upon the platform and was there injured he could not recover. *Held*, that the evidence justified a finding that plaintiff did not drop upon the platform, but upon the stanchions or chute; that the jury properly found defendant guilty of negligence in leaving the stanchions and chute in the condition they were and the area but partially covered by the narrow platform; and so, that it had failed to furnish a proper fire escape within the meaning of the statute. *Johnson v. S. G. & L. Co*. 152

2. Defendant operated a single-track street railroad, using one-horse cars in charge of a single employee, who acted as conductor and driver. The cars passed each other by means of switches. The rear platform of each car, where passengers enter, is two feet narrower than the distance between the rails; at the rear of this platform is a dash half its width and about thirty inches high. The brake is in front of the driver's

platform. Two cars met in a space between two switches; in order to take one of them back to a switch the horse was unhitched and the driver called upon plaintiff, a boy about eleven years old, to take the reins; he drove the horse around to the rear of the car, and after the whiffletree was attached took his place on the rear platform, and by direction of the driver started the horse, the driver taking his place on the front platform to manage the brake. Some boys in the car, frightened by the driver, who ordered them to get off the car, and hurrying to get off from the platform on which plaintiff was standing, pushed him therefrom and he was injured. In an action to recover damages the only specification of negligence in the complaint was that the platform was unsafe upon which to place a boy of plaintiff's age to perform the duties imposed on him, and upon the trial the question of negligence was confined to this point. *Held*, that the emergency authorized the driver to employ outside assistance; but that there was no reasonable ground for holding that the rear platform was an unsafe place to put the plaintiff, or that there was any negligence in placing him upon it to drive the horse; and so, that the question was improperly submitted to the jury. *Marks v. Rochester Ry. Co.* 181

See, also, *Geoghegan v. Atlas Steamship Co.* 369  
*Burns v. Matthews.* 386

#### NEGOTIABLE PAPER.

See *BILLS, NOTES, CHECKS.*

#### NEW TRIAL.

1. Plaintiff having recovered a judgment against defendant on the report of a referee for less than the damages demanded in the complaint, appealed from so much thereof as awarded damages. Defendant appealed from the whole judgment. The General Term affirmed "the judg-

ment from which plaintiff appeals," and reversed "the judgment from which the defendant appeals," and ordered a new trial, unless plaintiff stipulated to reduce the recovery as specified. Plaintiff failed to stipulate and judgment was entered in accordance with the order. *Held*, that the General Term had no authority to make the order; that if there was error in the judgment on the referee's report, this necessarily required the reversal of the entire judgment and a new trial as to the entire claim or a modification of the judgment. *Nat. Bd. M. Underwriters v. Nat. Bank Republic.* 64

2. The General Term, in reversing an order granting a new trial, held that the verdict could stand upon the ground of negligence of a driver in driving boys from a car when in motion. *Held*, error; that as this was not presented to the jury, and they were not permitted to consider it, the verdict could not be sustained on that ground; that if sustainable it must be sustained on the ground upon which the case was submitted. *Marks v. Rochester Ry. Co.* 181

#### NEW YORK (CITY OF).

1. In 1867 defendant granted to plaintiff the right to operate a ferry, and executed to it a lease of certain slips and bulkheads for the term of ten years, by the terms of which plaintiff was to erect the necessary ferry fixtures and to yield them up to defendant at the end of the term, subject, however, to the right reserved to such a lessee by the provision of the city charter of 1857 (§ 41, chap. 446, Laws of 1857), requiring all persons acquiring any ferry lease to purchase at a fair valuation the boats, buildings and other property of a former lessee necessary for the purposes of such ferry grant. Subsequently, by agreement between the parties, plaintiff surrendered the premises covered by the lease and accepted in lieu thereof a lease of other premises for the balance of the original



term; in and by which defendant covenanted that in case a new lease should not be granted to plaintiff, defendant would pay for the buildings and ferry fixtures erected by plaintiff on the demised premises. "in the manner provided for in and by the said first-mentioned recited indenture or lease." At the termination of this lease plaintiff demanded a renewal at the same rental, which defendant refused, and a lease was executed to another ferry company at an increased rental. In an action upon said covenant to recover the value of the buildings and ferry fixtures erected by plaintiff, *held*, that the rights of the parties were not affected by the revised charter of 1870 (Chap. 137, Laws of 1870), and that defendant was under no obligation to renew the lease at the same rental as provided for by the old lease. *N. Y. & B. F. Co. v. Mayor, etc., N. Y.*

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2. It appeared that the ferry company to whom the new lease was executed was organized by plaintiff's officers for its benefit and that of its stockholders. *Held*, that in effect the new lease was issued to plaintiff, it having become its own successor under a new name; and so, it had no cause of action. *Id.*

3. The provision of the New York Consolidation Act (§ 879, chap. 410, Laws of 1882) declaring that no action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city or to remove a cloud on title, but that the property owners shall be confined to the remedies given, is not limited to actions wherein it is sought simply to vacate assessments or to remove clouds on title, but prohibits as well an action to restrain the creation of a cloud on title by means of a sale by virtue of an assessment and the giving of a lease consequent on such sale on the ground that the assessment is void. The relief sought in such a case is, in substance, a vacation of the assessment. *Scudder v. Mayor, etc., N. Y.*

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4. The section was intended to confine property owners in all cases of alleged void assessments to the remedies provided for in the act. *Id.*

5. Under the provisions of the Revised Statutes in reference to the assessment for taxation of real property (1 R. S. 393, § 17), which requires the assessors to assess the same at its "just and full value as they would appraise the same in payment of a just debt due from a solvent debtor," and also under the provision of the New York Consolidation Act (§ 814, chap. 410, Laws of 1882), which requires the assessment to be "at the sum for which such property under ordinary circumstances would sell," it is the duty of the assessors to assess the property at its actual value. *People ex rel. Manh. R. Co. v. Barker.*

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6. As the commissioners of taxes and assessments in the city of New York are sworn officers, in the absence of evidence to the contrary, it is to be presumed that they have performed their duty in making such an assessment. *Id.*

See RECOGNIZANCE.

## NOTICE.

1. In October, 1870, H. was the owner of a tract of land subject to a purchase-money mortgage; he conveyed a portion thereof to a seminary, and C., the mortgagee, before the conveyance, executed to H. a release, absolute in its terms, of that portion from the lien of the mortgage. The deed of H. stated that the land was granted on the condition that it should be kept and used as a theological seminary; the grantee covenanted that it would, within five years, erect buildings on the premises for that purpose, and, in case of default, would, upon request, re-convey to H. In April, 1871, H., his wife and C. entered into a contract by which it was agreed that the land covered by said mortgage, except that portion to which the seminary "may

retain title," and also other lands owned by H. and wife, should be sold off in lots and the purchase money divided between the parties in specified proportions. In June, 1871, H. conveyed certain other portions of the tract to W., which was also released by C. from the purchase-money mortgage. In May, 1873, the seminary re-conveyed to H. the land so conveyed to it by him, and in June, 1879, W. re-conveyed to H. the portion so conveyed to him. Thereafter H. and wife executed to M., the original plaintiff herein, two mortgages on the portions so re-conveyed to him by the seminary and W. In an action to foreclose said mortgages defendants claimed that by reason of the covenant for re-conveyance in the deed to the seminary the land conveyed, upon being re-conveyed to H., became subject to the agreement and subject to be sold under its provisions, and although M. had no actual notice of the agreement that the record thereof was constructive notice; and so, that she took her mortgage subject to the rights of third parties provided for in the agreement. *Held*, untenable. *Oliphant v. Burns*.

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2. In July, 1880, an action was brought by the executors of C. against H. and others to enforce specific performance of the said agreement. The complaint, in describing the property to be affected, excluded the parcels sold to the seminary and to W. M. was made one of the defendants. She appeared and set up the releases, and thereupon, by consent, the complaint was dismissed as to her. The judgment therein, to which none of the remaining defendants appeared to have raised any objection, directed the sale of the seminary parcel with the land described in the complaint. After the commencement of the action, but before entry of judgment therein, one of plaintiffs' mortgages was executed. *Held*, that the *lis pendens* in that action was no notice to M., as the complaint excluded the seminary parcel, and any agreement between third parties to include it therein and in the

judgment was ineffectual to affect her rights under her mortgage, and, therefore, so far as she was concerned, there was a legal unincumbered title in H. at the time he executed the mortgages in question. *Id.*

## OFFICERS.

*See* PUBLIC OFFICERS.

## PARTNERSHIP.

*See* WILL.

## PASS.

1. A person appointed to the office of railroad policeman under the "Railroad Law" (§ 58, chap. 565, Laws of 1891) is a public officer within the meaning of the constitutional provision (Art. 13, § 5) prohibiting a public officer from receiving for his own use and benefit a free pass from any corporation. *Dempsey v. N. Y. C. & H. R. R. Co.* 290
2. Where, however, prior to the adoption of the Constitution plaintiff entered into a contract with defendant, a railroad corporation, by which he agreed to render services for it in preventing depredations upon its property by thieves and trespassers, he to receive for his services a fixed salary and also an annual pass for transportation over its road and that of another railroad company, which could be used by him whether engaged in the business of the corporation or in his own private affairs, and to carry out his contract plaintiff procured an appointment to said office of railroad policeman, qualified as such, and entered upon the performance of his duties, *held*, that the pass to which he was entitled under the contract was not a "free pass" within the meaning of said constitutional provision; that the contract, therefore, was not in conflict with that provision; and that an action was maintainable to compel specific performance of the contract by defendant. *Id.*

PERSONAL PROPERTY.

In assessing personal property assessors are entitled to exercise more latitude than is permitted in assessing real property. *People ex rel. Manh. R. Co. v. Barker.* 304

PLEADING.

1. A cause of action upon an account stated does not rest upon the obligation originally created when the items of indebtedness arose, but upon the agreement of the parties, made after the transactions constituting the account, that a certain balance remains due from one to the other, and the promise of the former to pay this balance; and so, it is unnecessary in an action upon an account stated to set forth in the complaint the subject-matter of the original debt. *Schutz v. Morette.* 137

2. The complaint in an action against an executor alleged, in substance, that plaintiff presented a duly verified claim, which was set forth in full, against the decedent's estate, to defendant, who acknowledged its receipt, and although he has had a reasonable opportunity to examine into its validity and fairness he has not disputed or rejected the same, but refuses to pay it. The claim on its face, in connection with other facts averred in the complaint, showed presumptively that a part at least was barred by the Statute of Limitations at the time of the death of the testatrix. Upon demurrer to the complaint, *held*, that it did not state a cause of action. *Id.*

POWERS.

By the will of B. the executors were empowered to sell any and all of his real estate when in their judgment they might deem it for the best interests of the estate. The executors sold the real estate; they paid, in discharge of the testator's debts, a sum in excess of that realized from the personalty. In proceedings for a final accounting by the executors, *held*, that before distributing the proceeds of

the sale among the residuary devisees, they were entitled to reimburse themselves therefrom for the sum so paid in excess of the personalty, and were entitled to a credit for that sum, and this, without regard to the question as to whether the power of sale was given for the purpose of paying debts. *In re Bolton.* 257

PRACTICE.

1. Plaintiff having recovered a judgment against defendant on the report of a referee for less than the damages demanded in the complaint appealed from so much thereof as awarded damages. Defendant appealed from the whole judgment. The General Term affirmed "the judgment from which plaintiff appeals," and reversed "the judgment from which the defendant appeals," and ordered a new trial, unless plaintiff stipulated to reduce the recovery as specified. Plaintiff failed to stipulate and judgment was entered in accordance with the order. *Held*, that the General Term had no authority to make the order; that if there was error in the judgment on the referee's report, this necessarily required the reversal of the entire judgment and a new trial as to the entire claim or a modification of the judgment. *Nat. Bd. M. Underwriters v. Nat. Bank Republic.* 64

2. After entry of judgment in an equity action on findings of fact and conclusions of law, the Special Term, which tried the action, has no power on motion for a re-settlement of the findings and conclusions to make amendments therein, altering the decision on the merits and changing the substantial rights of the parties. *Heath v. N. Y. B. L. B. Co.* 260

3. The authority given to the court by the Code of Civil Procedure (§ 723) to make amendments is confined to such as do not affect the substantial rights of the parties. *Id.*

4. An appeal direct to the United States Supreme Court is not au-

thorized either by the United States Revised Statutes or the act of Congress of 1891 (Chap. 517, Laws of 1891), creating Circuit Courts of Appeal, from a decision of a judge of a District Court at Chambers, denying an application for a writ of habeas corpus. *In re Buchanan.* 264

5. Such an appeal, therefore, does not operate as a stay, and where the writ was applied for in case of one imprisoned under judgment of a state court finding him guilty of murder and sentencing him to death, it furnishes no reason for delaying the execution of the sentence. *Id.*

6. A reprieve to a day certain granted by the governor in a capital case, which day is beyond the week in which, by order of the court, the execution was to take place, does not render it necessary to have the prisoner brought before the court to have the time of execution again fixed, but authorizes the execution of the sentence on the day on which the reprieve terminates. *Id.*

7. The distinction between a reprieve and a suspension of sentence pointed out. *Id.*

8. The provisions of the Code of Criminal Procedure (§§ 503, 504) providing that when a person sentenced to death has not, for any reasons save those specified, been executed pursuant to the sentence at the time specified, and the judgment inflicting the sentence stands in full force, such person shall be brought before one of the courts specified and the day for the execution of the sentence again fixed, does not apply in the case of a reprieve, unless the day fixed thereby has passed and the sentence has not been executed, in which case the provisions are applicable. *Id.*

#### PRESUMPTIONS.

1. While a voter may change his legal residence into a new district in spite of the fact that he becomes a student in an institution

of learning therein, presumably his occupation of rooms in the institution is only during the prescribed period of study, and so, such occupation is no evidence of a change of residence, but the facts to establish the change must be wholly independent of his presence in the new district as a student, and, *it seems*, should be clear and convincing to overcome the natural presumption. *In re Goodman.* 284

2. *It seems*, also, that a verified statement of the voter of a mental intention to change his residence is not, unless fortified by consistent acts, sufficient to overcome such presumption. *Id.*

#### PRINCIPAL AND SURETY.

*See SURETY.*

#### PROCEDURE.

*See PRACTICE.*

#### PROOF.

*See EVIDENCE.*

#### PROPERTY.

*See PERSONAL PROPERTY.*  
*REAL PROPERTY.*

#### PUBLIC OFFICERS.

1. A writ of mandamus will not be granted upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office. *It seems*, that the appropriate remedy in such case is by quo warranto. *People ex rel. Lewis v. Brush.* 60

2. A person appointed to the office of railroad policeman under the "Railroad Law" (§ 58, chap. 565, Laws of 1891) is a public officer

within the meaning of the constitutional provision (Art. 13, § 5) prohibiting a public officer from receiving for his own use and benefit a free pass from any corporation. *Dempsey v. N. Y. C. & H. R. R. Co.* 290

3. Where, however, prior to the adoption of the Constitution plaintiff entered into a contract with defendant, a railroad corporation, by which he agreed to render services for it in preventing depredations upon its property by thieves and trespassers, he to receive for his services a fixed salary and also an annual pass for transportation over its road and that of another railroad company, which could be used by him whether engaged in the business of the corporation or in his own private affairs, and to carry out his contract plaintiff procured an appointment to said office of railroad policeman, qualified as such, and entered upon the performance of his duties, *held*, that the pass to which he was entitled under the contract was not a "free pass" within the meaning of said constitutional provision; that the contract, therefore, was not in conflict with that provision; and that an action was maintainable to compel specific performance of the contract by defendant. *Id.*

4. As the commissioners of taxes and assessments in the city of New York are sworn officers, in the absence of evidence to the contrary, it is to be presumed that they have performed their duty in making an assessment. *People ex rel. Manh. R. Co. v. Barker.* 304

*See QUO WARRANTO.*

QUO WARRANTO.

1. A writ of a mandamus will not be granted upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office. *It seems*, that the appropriate remedy in such

case is by quo warranto. *People ex rel. Lewis v. Brush.* 60

2. An application for a peremptory writ of mandamus requiring defendant B. to surrender to relator the office of mayor of the city of Mt. V., and that the other defendants, composing the common council, recognize him as mayor, was made upon the relator's affidavit, which alleged, in substance, that at the election held in 1894, he received a majority of the votes lawfully cast for mayor, and that on the next day at a regular meeting of the common council the votes were duly canvassed and he was declared elected; also, upon the certificate of the city clerk, that a resolution to that effect was adopted by the common council, and the affidavit of B. to the effect that he conceded the relator was duly elected, and that there was a valid canvass. An affidavit of one of the defendants was read in opposition, which denied that the relator received a plurality of all the votes, or that it so appeared from the lawful certificates of the inspectors of election on file in the office of the city clerk, or that there was a regular meeting of the common council at which there was a canvass of the votes for mayor. *Held*, that the application was properly denied; that a serious question was raised by the opposing affidavit, as to the relator's title to the office; and so, that a mandamus was not his proper remedy. *Id.*

RAILROADS.

1. A person appointed to the office of railroad policeman under the "Railroad Law" (§ 58, chap. 565, Laws of 1891) is a public officer within the meaning of the constitutional provision (Art. 13, § 5) prohibiting a public officer from receiving for his own use and benefit a free pass from any corporation. *Dempsey v. N. Y. C. & H. R. R. Co.* 290
2. Where, however, prior to the adoption of the Constitution plaintiff entered into a contract with defendant, a railroad corporation,

by which he agreed to render services for it in preventing depredations upon its property by thieves and trespassers, he to receive for his services a fixed salary and also an annual pass for transportation over its road and that of another railroad company, which could be used by him whether engaged in the business of the corporation or in his own private affairs, and to carry out his contract plaintiff procured an appointment to said office of railroad policeman, qualified as such, and entered upon the performance of his duties, *held*, that the pass to which he was entitled under the contract was not a "free pass" within the meaning of said constitutional provision; that the contract, therefore, was not in conflict with that provision; and that an action was maintainable to compel specific performance of the contract by defendant. *Id.*

3. When a petition, which institutes proceedings for the condemnation of real property, is properly and duly presented to the Supreme Court, that court is required, if no sufficient cause is shown in opposition, to make an order appointing commissioners to ascertain the compensation to be made to the property owner; and, when their report comes on to be confirmed by the court, then is the time for judicial action upon it, either in confirming it, or in setting it aside for irregularity or for error of law in the proceedings. *In re Southern Boulevard R. R. Co.* 352

4. Where, therefore, in such proceedings, it appeared that the land proposed to be condemned was laid out as a boulevard under the provisions of chapter 290, Laws of 1867, section 24 of which prohibited the construction of rail or tramways thereon, without a special act of the legislature, and provided that in such case nothing should affect the owners' right to recover the full value of the land taken, as if the boulevard had never been laid out; and it also appeared that chapter 723, Laws of 1887, amended said section by excepting from said prohibition railroad companies organized

under chapter 252, Laws of 1884, of which the petitioner was one, and the court refused to appoint commissioners, upon the ground that, as the act of 1887 had been held to be unconstitutional, it had no power to authorize proceedings under said act, *held*, that such power was conferred upon the Supreme Court by the General Railroad Law, and was not affected by the said act of 1887; that its provisions were for the consideration of the tribunal to be constituted by the order of the court or of the court itself upon the coming in of its report, and that the refusal to appoint commissioners was error. *Id.*

### REAL PROPERTY.

Under the provisions of the Revised Statutes in reference to the assessment for taxation of real property (1 R. S. 393, § 17), which requires the assessors to assess the same at its "just and full value as they would appraise the same in payment of a just debt due from a solvent debtor," and also under the provision of the New York Consolidation Act (§ 814, chap. 410, Laws of 1882), which requires the assessment to be "at the sum for which such property under ordinary circumstances would sell," it is the duty of the assessors to assess the property at its actual value. *People ex rel. Manh. R. Co. v. Barker.* 304

### RE-ARGUMENT (DENIAL OF MOTION FOR).

See *Smith v. Town of Greenwich.* 372

### RECOGNIZANCE.

The law permitting a judgment to be entered upon a recognizance in the city of New York after an order of forfeiture constitutes part of the undertaking, and the party executing it consents that in case of forfeiture judgment may at once be entered thereon, upon which a general execution may be issued, and this constitutes a voluntary appearance in the action. *People v. Cowan.* 348

REMEDIES.

1 The firm of F. Bros. & Co. being indebted to certain banks on promissory notes not yet due, and being in financial trouble, advised the banks of that fact, and entered into an agreement with them, in pursuance of which the banks surrendered the notes and received in place thereof the firm notes payable on demand, also an instrument in writing, by the terms of which the firm transferred to the banks as security all its stock in trade and fixtures, with authority to hold and sell the same and apply the net proceeds to the payment of the notes; any surplus to be paid over to the firm or its assigns. The banks took immediate possession of the property so transferred, sold the same and applied the net proceeds ratably to the payment of the notes, such proceeds not being sufficient to pay the whole indebtedness. In an action by certain judgment creditors of the firm to set aside the transfer as being fraudulent and void against creditors these facts appeared: On the next day after the transaction said firm executed to other creditors various similar transfers which, as a whole, covered all the remaining property of the firm. These transfers bore the same date as the one in question. No general assignment for the benefit of creditors was made by the firm. The trial court found that at the time of the transfer and delivery of the property to the banks neither of them had any knowledge of any other transfer or intended transfer by the firm, and that the transaction was without intent to hinder, defraud or delay creditors. *Held*, that the complaint was properly dismissed; that so far as the evidence disclosed there was no relation or connection between the transaction with the banks and those with other creditors, and so they could not be considered as one and the same transaction, and there was no violation shown of the prohibition of the General Assignment Act (§ 30, chap. 503, Laws of 1887) prohibiting preferences in such an assignment exceeding one-third of the value of the assigned estate. *Maass v. Fulk*. 34

2. *It seems*, that had there been a general assignment by the firm, and the transaction with the banks constituted an undue preference, plaintiffs' action was not the proper remedy; that instead of an action in their own behalf, it should have been in behalf of all the creditors excluded by the transfers from a share in the debtors' assets, to secure to them a ratable distribution of two-thirds thereof. *Id*.

3. A writ of mandamus will not be granted upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office. *It seems*, that the appropriate remedy in such case is by quo warranto. *People ex rel. Lewis v. Brush*. 60

4. An application for a peremptory writ of mandamus requiring defendant B. to surrender to relator the office of mayor of the city of Mt. V., and that the other defendants, composing the common council, recognize him as mayor, was made upon the relator's affidavit, which alleged, in substance, that at the election held in 1894, he received a majority of the votes lawfully cast for mayor, and that on the next day at a regular meeting of the common council the votes were duly canvassed and he was declared elected; also, upon the certificate of the city clerk, that a resolution to that effect was adopted by the common council, and the affidavit of B. to the effect that he conceded the relator was duly elected, and that there was a valid canvass. An affidavit of one of the defendants was read in opposition, which denied that the relator received a plurality of all the votes, or that it so appeared from the lawful certificates of the inspectors of election on file in the office of the city clerk, or that there was a regular meeting of the common council at which there was a canvass of the votes for mayor. *Held*, that the application was properly denied; that a serious question was raised by the

opposing affidavit, as to the relator's title to the office; and so, that a mandamus was not his proper remedy. *Id.*

### REPLEVIN.

1. Where a sale of goods on credit has been induced by fraud on the part of the purchaser, the vendor may, on discovery of the fraud, disaffirm the sale and follow the proceeds of the goods in the hands of a sheriff, who has levied upon and sold them by virtue of an execution against the purchaser. *Converse v. Sickles.* 200
2. Defendant, a sheriff, under executions against F. R. & Co., levied upon certain goods which had been sold on credit by plaintiff to that firm. Plaintiff, claiming that the sale was induced by fraud, disaffirmed the sale, and brought an action of replevin to recover the goods. On trial of said action plaintiffs' counsel, in his opening, stated that he was unable to show that a demand upon defendant for a return of the goods was made and refused, and conceded that the goods had been taken by plaintiffs and disposed of. Thereupon, on motion of defendant's counsel, a verdict was rendered for defendant for a return of the goods, and assessing their value at a sum agreed upon. Judgment was entered and plaintiffs paid the amount thereof, but served on defendant a demand in writing for a return of the money, which they claimed as the proceeds of goods obtained from them by fraud. On refusal to return, this action was brought, plaintiffs claiming to charge defendant as trustee for the proceeds of their goods in his hands, and asking for an accounting and payment over of such proceeds. *Held*, that the judgment in the replevin suit was not conclusive against plaintiffs, either as *res adjudicata*, estoppel or a bar; that the decision was in effect simply that the action was prematurely brought, and there was no adjudication on the merits. *Id.*

3. Also, *held*, that it was immaterial that the moneys paid over to the

sheriff were not the identical moneys received by plaintiffs for the goods; that as they were paid over as the proceeds they were to be so regarded. *Id.*

### REPRIEVE.

1. A reprieve to a day certain granted by the governor in a capital case, which day is beyond the week in which, by order of the court, the execution was to take place, does not render it necessary to have the prisoner brought before the court to have the time of execution again fixed, but authorizes the execution of the sentence on the day on which the reprieve terminates. *In re Buchanan.* 264
2. The distinction between a reprieve and a suspension of sentence pointed out. *Id.*
3. The provisions of the Code of Criminal Procedure (§§ 503, 504) providing that when a person sentenced to death has not, for any reasons save those specified, been executed pursuant to the sentence at the time specified, and the judgment inflicting the sentence stands in full force, such person shall be brought before one of the courts specified and the day for the execution of the sentence again fixed, does not apply in the case of a reprieve, unless the day fixed thereby has passed and the sentence has not been executed, in which case the provisions are applicable. *Id.*

### RES ADJUDICATA.

*See* FORMER ADJUDICATION.

### RESCISSION.

1. While the general rule is that, where a contract is rescinded while in the course of performance, no claim in respect of performance may thereafter be made, it does not apply where, by the agreement of rescission, the claim has been expressly or impliedly reserved. *Mayor, etc., N. Y. v. N. Y. R. Cons. Co.* 210



2. Defendant, the N. Y. R. C. Co., being the highest bidder, was awarded the privilege of introducing its refrigerating apparatus in one of the New York city markets, and entered into a contract with the city, by which it agreed, among other things, to pay to the city a specified sum annually, the payments to be made quarterly. A bond was furnished by the company upon which the other defendants were the sureties. The recital in the bond referred to the contract which was attached, and it was conditioned for the performance of "each and every condition therein contained." In an action to recover two quarterly payments alleged to be due on the contract, *held*, that the recital was broad enough to cover the condition, and to render the sureties liable if a breach was established. *Id.*

3. The contract provided that, in case of non-performance by the company, certain prescribed proceedings might be taken, and, after a hearing therein, the city comptroller, upon direction of the commissioners of the sinking fund, was vested with power to notify the company to discontinue its system. After the commencement of this action such proceedings were instituted, and at the termination thereof the comptroller, by direction of the commissioners, notified the company to discontinue and that the contract was canceled and annulled. Defendants claimed that this cancellation destroyed the cause of action. *Held*, untenable; that it was not a rescission in the strict technical sense which destroys all right of action, but simply a termination of the contract according to its terms, which left undisturbed all existing liabilities. *Id.*

### RESIDENCE.

1. Where a person residing in one election district of a city removes to, takes and occupies a room in a seminary of learning in another district, as a student, and not permanently as a residence, he neither

loses his residence nor gains a new residence in the seminary district by the removal, and is lawfully entitled to vote in the former district, not the latter. *In re Goodman*. 284

2. While the voter may change his legal residence into a new district in spite of the fact that he becomes a student in an institution of learning therein, presumably his occupation of rooms in the institution is only during the prescribed period of study, and so, such occupation is no evidence of a change of residence, but the facts to establish the change must be wholly independent of his presence in the new district as a student, and, *it seems*, should be clear and convincing to overcome the natural presumption. *Id.*

3. *It seems*, also, that a verified statement of the voter of a mental intention to change his residence is not, unless fortified by consistent acts, sufficient to overcome such presumption. *Id.*

### RESTITUTION.

Under the provision of the Code of Civil Procedure (§ 1823) providing that "when a final judgment or order is reversed on appeal the appellate court or the General Term of the same court, as the case may be, may compel restitution of property," etc., when a judgment of the City Court of New York has been affirmed by the General Term of that court, but subsequently reversed by the General Term of the Court of Common Pleas and the case remitted to the City Court for a new trial, and when pending the appeals the property of the judgment debtor has been sold on execution, a motion for restitution may properly be made at the General Term of the City Court. *Carlson v. Winterson*. 345

### REVIEW.

*See* APPEAL.

## REVISED STATUTES.

1 R. S. 393, § 17.

*See People ex rel. v. Barker*, 304.

1 R. S. 748, § 2.

*See Lamb v. Lamb*, 317.

## RULES.

1. While under the Supreme Court rules (Rule 11) an oral stipulation in respect to the proceedings in a cause is not binding and will not be carried into effect by the court, it will not permit a party to be misled, deceived or defrauded by means thereof, and in cases where it has been acted upon by the party making it, he will not be permitted to retract and take advantage of the acts or omissions of his adversary induced thereby. *Mut. L. Ins. Co. N. Y. v. O'Donnell*. 275

2. *It seems*, where in such a case the question as to whether the alleged oral stipulation was made is contested, while the Special Term has power to determine it upon affidavits, where a large amount is involved and the conflict is sharp, the question should be determined upon common-law evidence. *Id.*

## SALES.

1. Where a sale of goods on credit has been induced by fraud on the part of the purchaser, the vendor may, on discovery of the fraud, disaffirm the sale and follow the proceeds of the goods in the hands of a sheriff, who has levied upon and sold them by virtue of an execution against the purchaser. *Converse v. Sickles*. 200

2. Defendant, a sheriff, under executions against F. R. & Co., levied upon certain goods which had been sold on credit by plaintiff to that firm. Plaintiff, claiming that the sale was induced by fraud, disaffirmed the sale, and brought an action of replevin to recover the goods. On trial of said action plaintiffs' counsel, in his opening, stated that he was unable to show that a demand upon defendant for a return of the goods was made

and refused, and conceded that the goods had been taken by plaintiffs and disposed of. Thereupon, on motion of defendant's counsel, a verdict was rendered for defendant for a return of the goods, and assessing their value at a sum agreed upon. Judgment was entered and plaintiffs paid the amount thereof, but served on defendant a demand in writing for a return of the money, which they claimed as the proceeds of goods obtained from them by fraud. On refusal to return, this action was brought, plaintiffs claiming to charge defendant as trustee for the proceeds of their goods in his hands, and asking for an accounting and payment over of such proceeds. *Held*, that the judgment in the replevin suit was not conclusive against plaintiffs, either as *res adjudicata*, estoppel or a bar; that the decision was in effect simply that the action was prematurely brought, and there was no adjudication on the merits. *Id.*

3. Also, *held*, that it was immaterial that the moneys paid over to the sheriff were not the identical moneys received by plaintiffs for the goods; that as they were paid over as the proceeds they were to be so regarded. *Id.*

## SENTENCE.

1. A reprieve to a day certain granted by the governor in a capital case, which day is beyond the week in which, by order of the court, the execution was to take place, does not render it necessary to have the prisoner brought before the court to have the time of execution again fixed, but authorizes the execution of the sentence on the day on which the reprieve terminates. *In re Buchanan*. 264

2. The distinction between a reprieve and a suspension of sentence pointed out. *Id.*

3. The provisions of the Code of Criminal Procedure (§§ 503, 504), providing that when a person sentenced to death has not, for any reasons save those specified, been executed pursuant to the sentence

at the time specified, and the judgment inflicting the sentence stands in full force, such person shall be brought before one of the courts specified and the day for the execution of the sentence again fixed, does not apply in the case of a reprieve, unless the day fixed thereby has passed and the sentence has not been executed, in which case the provisions are applicable. *Id.*

### SERVANT.

*See* MASTER AND SERVANT.

### SERVICE (AND PROOF OF).

1. *It seems*, that under the provision of the Code of Civil Procedure in regard to the service of summons upon a foreign corporation which authorizes the service by delivery of a copy to "a managing agent" of the corporation within the state it is not necessary that the office of the person to whom the copy is delivered should be precisely described as "managing agent," but it was intended that any person holding some responsible and representative relation to the company, such as the term "managing agent" would include, might be served. *Coter v. P. Br. Co.* 281
2. In an action against a foreign corporation a copy of the summons was delivered in this state to C., who the plaintiff claimed was a managing agent of defendant. Upon a motion to set aside the service the moving affidavits alleged that C. is not and was not at the time of the service defendant's managing agent in any sense, but was its "representative" in the city of Chicago, where he resided, and was only temporarily visiting in the city of New York, when served. The opposing affidavits were to the effect that C. was in New York at the time, upon business connected with the company; that he stated that he represented it, and that his name appeared in the Chicago city directory as "manager" of the company. *Held*, that sufficient was not shown to establish that C. was managing agent of defend-

ant within the meaning of said provision; and so, that there was no valid service of the summons. *Id.*

### SESSION LAWS.

- 1857, chap. 446, § 41.  
*See N. Y. & B. F. Co. v. Mayor, etc.*, 145.  
 1857, chap. 456.  
*See People ex rel. v. Barker*, 304.  
 1867, chap. 290, § 24.  
*See In re S. B. R. R. Co.*, 352.  
 1870, chap. 137.  
*See N. Y. & B. F. Co. v. Mayor, etc.*, 145.  
 1875, chap. 611, § 37.  
*See Jones v. Butler*, 55.  
 1882, chap. 410, § 814.  
*See People ex rel. v. Barker*, 304.  
 1882, chap. 410, § 879.  
*See Scudder v. Mayor, etc.*, 245.  
 1884, chap. 252.  
*See In re S. B. R. R. Co.*, 352.  
 1886, chap. 409.  
*See Johnson v. S. G. & L. Co.*, 152.  
 1887, chap. 462.  
*See Johnson v. S. G. & L. Co.*, 152.  
 1887, chap. 503, § 30.  
*See Mauss v. Fulk*, 34.  
 1887, chap. 723.  
*See In re S. B. R. R. Co.*, 352.  
 1888, chap. 583, § 5, tit. 12.  
*See In re Smith*, 68.  
 1888, chap. 583, § 6, tit. 13.  
*See In re People ex rel. Dobson*, 357.  
 1890, chap. 568, § 130.  
*See People ex rel. Root v. Bd. Supra.* 107.  
 1891, chap. 565, § 58.  
*See Dempsey v. N. Y. C. & H. R. R. Co.*, 290.  
 1892, chap. 687, § 48.  
*See O'Brien v. Grant*, 163.  
 1892, chap. 710.  
*See In re People ex rel. Dobson*, 357.  
 1893, chap. 661, § 14.  
*See In re Smith*, 68.  
 1893, chap. 661, §§ 62, 63.  
*See Tappen v. State*, 44.  
 1894, chap. 275, § 37.  
*See In re Goodman*, 284.

### SPECIAL TERM.

*See* COURTS.

### STATES.

1. *It seems*, it was not the purpose of the fourteenth amendment to the

United States Constitution, declaring that no state shall "deprive any person of life, liberty or property without due process of law," to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of those courts over crimes and offenses, defined and declared by its laws, and committed within its territorial jurisdiction. *In re Buchanan*. 264

2. *It seems*, also, that while in case of accusation of crime the accused is entitled to an inquiry, a hearing and a judgment before he can be deprived by sentence of his liberty or life, within these limitations what constitutes "due process of law" is to be determined by the state in every case where it can exercise rightful authority, and said amendment confers no jurisdiction upon the Federal courts to supervise the administration by state tribunals of the criminal law of the state, to correct errors committed on trial, or to modify or change their judgments. *Id.*

#### STATUTES.

1. In an action against a stockholder of a limited liability corporation, organized under the Business Corporation Act of 1875 (Chap. 611, Laws of 1875), to enforce the liability imposed by the provision of said act (§ 37) declaring that the stockholders of such corporation shall be individually liable for its debts until the whole amount of its capital stock has been paid in and a certificate thereof has been recorded "in the office of the secretary of state and of the county in which the principal business office of such corporation is situated," the answer set forth, in substance, that within the time prescribed by law, and more than four years before the commencement of the action, the entire capital stock was paid in, and a certificate setting forth that fact was filed with the secretary of state. On demurrer to this portion of the answer, *held*, that as the statute was defective in its specification of the county office

where the certificate was to be recorded, the fact that it was not recorded in the county clerk's office did not, under the circumstances, impose the liability; that there was a substantial compliance with the provision of the statute; and so, that the demurrer was properly overruled. *Jones v. Butler*. 55

2. The rule that a special statute providing for a particular case and applicable to a particular locality is not repealed or modified by a subsequent statute, general in its terms and application, does not obtain where the intention of the legislature to repeal or modify the special law is clearly manifest. *In re People ex rel. Dobson*. 357
3. Accordingly, *held*, that chapter 710, Laws of 1892, which authorizes the board of fire commissioners, with the approval of the board of estimate and apportionment, in all cities, the population of which, according to the last census, exceeds nine hundred thousand, to fix the salaries of the members of the fire department, modifies the charter of the city of Brooklyn (§ 6, tit. 13, chap. 583, Laws of 1888), relating to the compensation of officers of its fire department, and it is the duty of the fire commissioner of that city to fix the salaries referred to, as provided in said act. *Id.*

*See* REVISED STATUTES.

SESSION LAWS.

UNITED STATES LAWS.

#### STATUTE OF LIMITATIONS.

*See* LIMITATIONS.

#### STAY OF PROCEEDINGS.

An appeal direct to the United States Supreme Court is not authorized either by the United States Revised Statutes or the act of Congress of 1891 (Chap. 517, Laws of 1891), creating Circuit Courts of Appeal, from a decision of a judge of a District Court at Chambers, denying an application for a writ of habeas corpus. Such an appeal,

therefore, does not operate as a stay, and where the writ was applied for in case of one imprisoned under judgment of a state court finding him guilty of murder and sentencing him to death, it furnishes no reason for delaying the execution of the sentence. *In re Buchanan.* 264

### STIPULATION.

1. While under the Supreme Court rules (Rule 11) an oral stipulation in respect to the proceedings in a cause is not binding and will not be carried into effect by the court, it will not permit a party to be misled, deceived or defrauded by means thereof, and in cases where it has been acted upon by the party making it, he will not be permitted to retract and take advantage of the acts or omissions of his adversary induced thereby. *Mut. L. Ins. Co. N. Y. v. O'Donnell.* 275
2. *It seems*, where in such a case the question as to whether the alleged oral stipulation was made is contested, while the Special Term has power to determine it upon affidavits, where a large amount is involved and the conflict is sharp, the question should be determined upon common-law evidence. *Id.*

### STREET RAILROADS.

See NEGLIGENCE.  
RAILROADS.

### SUMMONS.

1. *It seems*, that under the provision of the Code of Civil Procedure in regard to the service of summons upon a foreign corporation which authorizes the service by delivery of a copy to "a managing agent" of the corporation within the state it is not necessary that the office of the person to whom the copy is delivered should be precisely described as "managing agent," but it was intended that any person holding some responsible and representative relation to the company, such as the term "manag-

ing agent" would include, might be served. *Coler v. P. Br. Co.* 281

2. In an action against a foreign corporation a copy of the summons was delivered in this state to C., who the plaintiff claimed was a managing agent of defendant. Upon a motion to set aside the service the moving affidavits alleged that C. is not and was not at the time of the service defendant's managing agent in any sense, but was its "representative" in the city of Chicago, where he resided, and was only temporarily visiting in the city of New York, when served. The opposing affidavits were to the effect that C. was in New York at the time, upon business connected with the company; that he stated that he represented it, and that his name appeared in the Chicago city directory as "manager" of the company. *Held*, that sufficient was not shown to establish that C. was managing agent of defendant within the meaning of said provision; and so, that there was no valid service of the summons. *Id.*

### SUPPLEMENTARY PROCEEDINGS.

1. The limitation in the provision of the Code of Civil Procedure (§ 2458) providing for the examination of a judgment debtor in proceedings supplementary to execution, that "the judgment must have been rendered upon the judgment debtor's appearance or by a personal service of the summons upon him," was not intended to, and does not protect a judgment debtor who is liable personally and generally, and against whom a general execution properly issues. *People v. Concan.* 348
2. The word "appearance" means a voluntary submission to the jurisdiction in whatever form manifested. *Id.*
3. The law permitting a judgment to be entered upon a recognition in the city of New York after an order of forfeiture con-

wholly within the town. *People ex rel. Root v. Bd. Suprs.* 107

2. In proceedings by mandamus to compel the county of Steuben to levy a tax to pay the proportion alleged to be due from it under said act of the expense incurred by the town of Addison for the repair and construction of bridges, it appeared that a portion of the expenditure was for the construction of a bridge in the village of Addison in said town. By the village charter the bridge was excepted from the jurisdiction of the village authorities, and left under the control of the commissioners of highways of the town. It was claimed by the board of supervisors that the bridge was not a town bridge within the statute. *Held*, untenable. *Id.*

#### TRIAL.

The General Term, in reversing an order granting a new trial, held that the verdict could stand upon the ground of negligence of a driver in driving boys from a car when in motion. *Held*, error; that as this was not presented to the jury, and they were not permitted to consider it, the verdict could not be sustained on that ground; that if sustainable it must be sustained on the ground upon which the case was submitted. *Marks v. Rochester Ry. Co.* 181

See, also, *People v. Leach.* 392

#### TRUSTS AND TRUSTEES.

1. By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company, which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is here-

inafter disposed of." By other clauses, down to the seventh, separate and distinct devises were made to a devisee named for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and a balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth clause. *Held*, that the "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses, and which would go to the residuary legatees; and so, that said residuary legatees were entitled to the fund. *U. S. Trust Co. N. Y. v. Black.* 1

2. Trusts may be created in personal property by parol, and to accomplish this no particular form of words is necessary. *Hirsh v. Auer.*

8. It is not material that the trust agreement deals with a contingent interest; when the interest becomes vested and the trustee receives the fund the trust attaches to it. *Id.*

4. H., the father of plaintiffs, at the time of his death held a policy or certificate of insurance on his life for \$2,000, payable, and which was paid, to his sister, C., the original defendant and the present defendant's testatrix. In an action to recover the amount so paid plaintiffs proved a parol agreement between H. and C., to the effect that when she collected the policy she would expend not to exceed \$500 thereof for his funeral expenses, etc., and would divide the balance equally between plaintiffs, who were his children. *Held*, that the agreement was valid; that C. received the amount of the insurance impressed with the trust created by the agreement, and so that a verdict was properly rendered for the \$1,500. *Id.*

#### UNDERTAKING.

1. The liability of a surety upon an undertaking, in the form prescribed by the Code of Civil Procedure (§§ 1852, 1856), given to stay proceedings on appeal from a final judgment to the General Term of the Supreme Court, is not terminated by the reversal of the judgment by the General Term, but continues and is enforceable in case of the ultimate affirmance of the judgment by this court on appeal from the order of General Term. *Foo Long v. Am. Surety Co.* 251

2. Upon appeal to the General Term from a judgment in favor of plaintiff on trial at Circuit such an undertaking was given. The judgment was reversed and a new trial granted. After an appeal to this court from an order of General Term, and after a return had been made and the appeal noticed for argument, the parties stipulated that a judgment should be entered reversing the order of the General Term and affirming absolutely the

judgment. On reading and filing said stipulation, this court, without argument or consideration of the case on its merits, reversed the order and affirmed the judgment. The usual remittitur was sent down and judgment entered in accordance therewith. In an action upon the undertaking, *held*, that there was not an affirmance of the original judgment within the true intent and meaning of the undertaking, but in substance the original judgment was reinstated by consent of the parties, that the undertaking referred to a reversal or dismissal of the appeal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent. *Id.*

#### UNITED STATES CONSTITUTION.

1. *It seems*, it was not the purpose of the fourteenth amendment to the United States Constitution, declaring that no state shall "deprive any person of life, liberty or property without due process of law," to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of those courts over crimes and offenses, defined and declared by its laws, and committed within its territorial jurisdiction. *In re Buchanan.* 264

2. *It seems*, also, that while in case of accusation of crime the accused is entitled to an inquiry, a hearing and a judgment before he can be deprived by sentence of his liberty or life, within these limitations what constitutes "due process of law" is to be determined by the state in every case where it can exercise rightful authority, and said amendment confers no jurisdiction upon the Federal courts to supervise the administration by state tribunals of the criminal law of the state, to correct errors committed on trial, or to modify or change their judgments. *Id.*

#### UNITED STATES LAWS.

1891, chap. 517.  
*See In re Buchanan*, 264.

## USAGE.

See BANKS AND BANKING.

## USE AND OCCUPATION.

1. L. died in 1885, leaving defendant, his widow, and plaintiffs, his three children, who were all under the age of fourteen, him surviving. After such death the widow and children continued to live in the dwelling house of the deceased, she taking care of the children and acting toward them as natural guardian. W. was appointed their general guardian upon the petition of defendant; this stated that the infants resided in the house and that no rent arose therefrom. In 1891 W. procured himself to be appointed guardian *ad litem* for the children, and as such brought this action to recover for the use and occupation of the dwelling house. It appeared that soon after the appointment of W. as general guardian he agreed to allow defendant \$1,000 a year for the maintenance and clothing of the children. No agreement was made for the payment of rent by defendant and no demand was made therefor, until a few days before the commencement of the action, and up to that time W. not only acquiesced in defendant's residence in said house, but consented to and advised it, and defendant's evidence showed and the jury found that it was expressly agreed that no rent was to be charged. *Held*, that the action was not maintainable. *Lamb v. Lamb*. 317
2. *It seems*, that so far as the complaint should be held to be one under the statute (1 R. S. 748, § 2) to recover rent for the use and occupation the action could not be maintained without proof of an agreement, express or implied, to pay rent. *Id.*

## VACCINATION.

See HEALTH.

## VENDOR AND PURCHASER.

1. Where a sale of goods on credit has been induced by fraud on the

part of the purchaser, the vendor may, on discovery of the fraud, disaffirm the sale and follow the proceeds of the goods in the hands of a sheriff, who has levied upon and sold them by virtue of an execution against the purchaser. *Converse v. Sickles*. 200

2. Defendant, a sheriff, under executions against F. R. & Co., levied upon certain goods which had been sold on credit by plaintiff to that firm. Plaintiff, claiming that the sale was induced by fraud, disaffirmed the sale and brought an action of replevin to recover the goods. On trial of said action plaintiffs' counsel, in his opening, stated that he was unable to show that a demand upon defendant for a return of the goods was made and refused, and conceded that the goods had been taken by plaintiffs and disposed of. Thereupon, on motion of defendant's counsel, a verdict was rendered for defendant for a return of the goods, and assessing their value at a sum agreed upon. Judgment was entered and plaintiffs paid the amount thereof, but served on defendant a demand in writing for a return of the money, which they claimed as the proceeds of goods obtained from them by fraud. On refusal to return, this action was brought, plaintiffs claiming to charge defendant as trustee for the proceeds of their goods in his hands, and asking for an accounting and payment over of such proceeds. *Held*, that the judgment in the replevin suit was not conclusive against plaintiffs, either as *res adjudicata*, estoppel or a bar; that the decision was in effect simply that the action was prematurely brought, and there was no adjudication on the merits. *Id.*
3. Also, *held*, that it was immaterial that the moneys paid over to the sheriff were not the identical moneys received by plaintiffs for the goods; that as they were paid over as the proceeds they were to be so regarded. *Id.*

## VOTER.

See ELECTIONS.



## WILL.

1. By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company, which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is hereinafter disposed of." By other clauses, down to the seventh, separate and distinct devises were made to a devisee named for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before-mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and a balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth clause. *Held*, that the "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses, and which would go to the residuary legatees; and so, that said residuary legatees were entitled to the fund. *U. S. Trust Co. v. Black.* 1
2. Where a devise contains a clause, in terms a condition, that the devisee pay certain legacies, in the absence of any provision for re-entry or forfeiture, or of anything to support an inference that the testator intended the estate to depend upon performance of the requirement, the words used will be held to import a covenant, not a condition. *Cunningham v. Parker.* 29
3. D., by his will, after directing the payment of his debts by his executor, and after giving various legacies, devised and bequeathed all the residue of his estate, real and personal, to his son A., "on the condition and proviso that he pay" the said legacies within four years after the death of the testator, and the real estate so devised to A. was charged with the payment of the same. A. was appointed executor; he accepted the devise and went into possession of the real estate, but did not pay the legacies within the four years. At the death of D. his personalty was insufficient to pay his debts. In an action brought by creditors of the decedent under the Code of Civil Procedure (§ 1844, *et seq.*) to reach and apply the real estate to the payment of their debts, *held*, that the failure to pay the legacies did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the land so devised to him. *Id.*
4. Where a will is the subject of construction the intention of the testator, as disclosed by the will, not a general rule of construction, is to govern when they come in conflict. *In re James.* 78
5. By his will the testator gave to his wife "for her sole use, enjoy-

ment and benefit, during her life, without restraint, deduction or interference in any manner whatsoever," one-half of the income of all his property, "of every kind," during her life; the remainder of the income, and the estate itself, after the death of the wife, he gave to his "legal heirs," subject to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage. *Held* (BARTLETT, J., dissenting), that dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; that the intention of the testator was not to create a technical trust, but that his property should remain in specie for his widow's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it. *Id.*

6. The testator's partner in business died a few days before him. In an action brought by a firm creditor for the protection and distribution of the firm assets a receiver was appointed, who collected interest and dividends upon certain bonds and stocks. A judgment was rendered in said action settling the receiver's accounts and directing him to deliver over the assets to the widow, as executrix of the surviving partner. *Held*, that the judgment was not open to attack upon the accounting of the execu-

trix, and that she was entitled to treat as income the money collected by the receiver as dividends and interest and paid over to her. *Id.*

7. The will of C. directed his executors to divide one-half of his estate into as many equal shares as he should leave children him surviving, to collect the interest on each share and apply the same, or so much thereof as they might deem necessary, to the use of the child for whom the share was intended, and to accumulate the remainder until said child should become of age or sooner die, and upon the coming of age to pay over to him or her the accumulations, and thereafter to apply the whole interest and income to the use of said beneficiary during life; upon the death of a child before or after coming of age to transfer the share to his or her children, and in case of the death of a child leaving no issue to transfer the share to the testator's surviving issue. In an action brought by the executors for a judicial settlement of their accounts, it appeared that the testator left two children, both infants, one of whom died under age, intestate and unmarried. There had been a large accumulation of interest upon the share of the child so dying. *Held*, that until the death of the child the entire interest of her share vested at once when paid in, and only the time of payment over, or enjoyment, was postponed until majority; and so, that the administratrix of the deceased child was entitled to the accumulation. *Smith v. Parsons.*

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8. *It seems* that where a will so provides for the accumulation of interest on an infant's share during minority, the testator has power to make such disposition thereof, in case of the death of the infant during minority, as he may see fit; and so, may bequeath it to any person, whether a minor, or of full age. Such a provision is not violative of the statute providing that accumulations must be for the benefit of minors. *Id.*



- of the making of the alleged agreement between him and C., and that the latter admitted she made the agreement. C. was alive at the time of the trial. *Held*, that the evidence was properly received; that it was not incompetent under the provisions of the Code of Civil Procedure (§ 829) as it simply tended to prove an admission of C. against her interests, not a personal transaction or conversation between the witness and a deceased person. *Hirsh v. Auer*. 18
2. A son of C., who was not a party to the action or beneficiary under the agreement, was also called as a witness for plaintiffs as to conversations with his father. *Held*, that the witness was not so interested as to prevent his testifying. *Id.*
8. In an action for use and occupation, defendant was permitted to prove, under objection and exception, that just prior to the time when a witness made the demand for rent he had a quarrel with defendant in which he made threats against her. *Held*, no error; that the testimony was admissible as showing the feeling of the witness against defendant and so as affecting his credibility as a witness. *Lamb v. Lamb*. 817



stitutes part of the undertaking, and the party executing it consents that in case of forfeiture judgment may at once be entered thereon, upon which a general execution may be issued, and this constitutes a voluntary appearance in the action. Proceedings supplementary to execution issued upon such a judgment may, therefore, properly be instituted.

*Id.*

### SUPREME COURT.

*See* CONDEMNATION OF REAL PROPERTY.

### SUPREME COURT RULES.

1. While under the Supreme Court rules (Rule 11) an oral stipulation in respect to the proceedings in a cause is not binding and will not be carried into effect by the court, it will not permit a party to be misled, deceived or defrauded by means thereof, and in cases where it has been acted upon by the party making it, he will not be permitted to retract and take advantage of the acts or omissions of his adversary induced thereby. *Mut. L. Ins. Co. N. Y. v. O'Donnell.* 275
2. *It seems*, where in such a case the question as to whether the alleged oral stipulation was made is contested, while the Special Term has power to determine it upon affidavits, where a large amount is involved and the conflict is sharp, the question should be determined upon common-law evidence. *Id.*

### SURETY.

1. The liability of a surety upon an undertaking, in the form prescribed by the Code of Civil Procedure (§§ 1352, 1356), given to stay proceedings on appeal from a final judgment to the General Term of the Supreme Court, is not terminated by the reversal of the judgment by the General Term, but continues and is enforceable in case of the ultimate affirmance of the judgment by this court on appeal from the

order of General Term. *Foo Long v. Am. Surety Co.* 251

2. Upon appeal to the General Term from a judgment in favor of plaintiff on trial at Circuit such an undertaking was given. The judgment was reversed and a new trial granted. After an appeal to this court from an order of General Term, and after a return had been made and the appeal noticed for argument, the parties stipulated that a judgment should be entered reversing the order of the General Term and affirming absolutely the judgment. On reading and filing said stipulation this court, without argument or consideration of the case on its merits, reversed the order and affirmed the judgment. The usual remittitur was sent down and judgment entered in accordance therewith. In an action upon the undertaking, *held*, that there was not an affirmance of the original judgment within the true intent and meaning of the undertaking, but in substance the original judgment was reinstated by consent of the parties; that the undertaking referred to a reversal or dismissal of the appeal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent. *Id.*

### SURROGATES.

1. Under the provision of the Code of Civil Procedure (§ 2545), declaring that a surrogate's decree "shall not be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," an appellate court is at liberty to disregard such an error if it could have had no influence upon the determination of the case. *In re Miner.* 121
2. Upon the death of J. letters of administration were issued to P. upon her estate, upon his petition, in which he alleged that he was J.'s surviving husband. No notice was given to the next of kin, and there was no appearance by them. P. filed his account, which was

settled by the surrogate, who awarded payment of the whole surplus to him as husband. Subsequently the next of kin filed a petition alleging that P. was never married to J. and asking to have the decree on the accounting set aside and the assets paid over to them. The evidence showed and the surrogate found that P. never had been the husband of the intestate and ordered that the letters of administration and the decree be revoked and vacated. On appeal the General Term reversed that portion of the surrogate's order which revoked the letters, on the sole ground that no such relief was asked for, but affirmed that portion vacating the decree. On appeal here it was claimed by P. that the unrevoked letters were conclusive proof of P.'s title as husband. *Held*, untenable; that while the unrevoked order appointing P. as administrator was conclusive as to his authority to act there was no estoppel making the reason which led to the granting the order a fact conclusively established as against the next of kin, who were not notified and did not appear; that they could waive their right to attack the order, and it could stand consistently with the relief asked for and granted. *In re Patterson*. 327

8. The will of S. contained a legacy payable to C. in case he paid during the testator's lifetime all assessments, dues and premiums upon any insurance on his life, taken for the benefit of, and payable to, A., his adopted son, and in case such insurance or some part thereof should be actually paid to A. one year from the testator's death. The testator's residuary estate he gave to his executors in trust to pay the income thereof to A. until he arrived at the age of thirty-five years, and then to pay over to him the principal. In an action for the construction of this clause, *held*, that the bequest to C., although future and contingent, vested as a right upon the testator's death, and so was alienable by him; that while the trust covered the entire residue except the contingent estate bequeathed to C., and there was a suspension of the power of alienation during the existence of the trust, that the suspension was simply for the life of A. or for a shorter period; and that, therefore, there was no unlawful suspension of the power of alienation, and that the bequest was valid. *Id.*

TAX.

*See* ASSESSMENT AND TAXATION.

TORT.

*See* NEGLIGENCE.

TOWNS.

1. Under the provisions of the "Highway Law" (§ 130, chap. 568, Laws of 1890), fixing the liability for the expenses of the construction and repair of public free bridges as between a town and county, the right of a town to demand contribution from the county when the bridge expenditure of the town is in excess of one-sixth of one per cent of the assessed valuation of its taxable property, is not limited to expenditures for bridges which cross streams forming boundaries of the town, but applies as well to bridges erected

SUSPENSION OF POWER OF ALIENATION.

1. A suspension of the power of alienation as to real estate and of absolute ownership as to personal property occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed. *Sawyer v. Crubby*. 192
2. A contingency attached to a legacy which will render it void as an unlawful suspension of the power of alienation, must be one that relates to the person who shall take, and who may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it may happen that there is no one who can alienate within that time. *Id.*

wholly within the town. *People ex rel. Root v. Bd. Suprs.* 107

2. In proceedings by mandamus to compel the county of Steuben to levy a tax to pay the proportion alleged to be due from it under said act of the expense incurred by the town of Addison for the repair and construction of bridges, it appeared that a portion of the expenditure was for the construction of a bridge in the village of Addison in said town. By the village charter the bridge was excepted from the jurisdiction of the village authorities, and left under the control of the commissioners of highways of the town. It was claimed by the board of supervisors that the bridge was not a town bridge within the statute. *Held*, untenable. *Id.*

#### TRIAL.

The General Term, in reversing an order granting a new trial, held that the verdict could stand upon the ground of negligence of a driver in driving boys from a car when in motion. *Held*, error; that as this was not presented to the jury, and they were not permitted to consider it, the verdict could not be sustained on that ground; that if sustainable it must be sustained on the ground upon which the case was submitted. *Marks v. Rochester Rwy. Co.* 181

See, also, *People v. Leach.* 392

#### TRUSTS AND TRUSTEES.

1. By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company, which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is here-

inafter disposed of." By other clauses, down to the seventh, separate and distinct devises were made to a devisee named for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and a balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth clause. *Held*, that the "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses, and which would go to the residuary legatees; and so, that said residuary legatees were entitled to the fund. *U. S. Trust Co. N. Y. v. Black.* 1

2. Trusts may be created in personal property by parol, and to accomplish this no particular form of words is necessary. *Hirsh v. Auer.*



3. It is not material that the trust agreement deals with a contingent interest; when the interest becomes vested and the trustee receives the fund the trust attaches to it. *Id.*

4. H., the father of plaintiffs, at the time of his death held a policy or certificate of insurance on his life for \$2,000, payable, and which was paid, to his sister, C., the original defendant and the present defendant's testatrix. In an action to recover the amount so paid plaintiffs proved a parol agreement between H. and C., to the effect that when she collected the policy she would expend not to exceed \$500 thereof for his funeral expenses, etc., and would divide the balance equally between plaintiffs, who were his children. *Held*, that the agreement was valid; that C. received the amount of the insurance impressed with the trust created by the agreement, and so that a verdict was properly rendered for the \$1,500. *Id.*

#### UNDERTAKING.

1. The liability of a surety upon an undertaking, in the form prescribed by the Code of Civil Procedure (§§ 1852, 1856), given to stay proceedings on appeal from a final judgment to the General Term of the Supreme Court, is not terminated by the reversal of the judgment by the General Term, but continues and is enforceable in case of the ultimate affirmance of the judgment by this court on appeal from the order of General Term. *Foo Long v. Am. Surety Co.* 251

2. Upon appeal to the General Term from a judgment in favor of plaintiff on trial at Circuit such an undertaking was given. The judgment was reversed and a new trial granted. After an appeal to this court from an order of General Term, and after a return had been made and the appeal noticed for argument, the parties stipulated that a judgment should be entered reversing the order of the General Term and affirming absolutely the

judgment. On reading and filing said stipulation, this court, without argument or consideration of the case on its merits, reversed the order and affirmed the judgment. The usual remittitur was sent down and judgment entered in accordance therewith. In an action upon the undertaking, *held*, that there was not an affirmance of the original judgment within the true intent and meaning of the undertaking, but in substance the original judgment was reinstated by consent of the parties, that the undertaking referred to a reversal or dismissal of the appeal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent. *Id.*

#### UNITED STATES CONSTITUTION.

1. *It seems*, it was not the purpose of the fourteenth amendment to the United States Constitution, declaring that no state shall "deprive any person of life, liberty or property without due process of law," to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of those courts over crimes and offenses, defined and declared by its laws, and committed within its territorial jurisdiction. *In re Buchanan.* 264

2. *It seems*, also, that while in case of accusation of crime the accused is entitled to an inquiry, a hearing and a judgment before he can be deprived by sentence of his liberty or life, within these limitations what constitutes "due process of law" is to be determined by the state in every case where it can exercise rightful authority, and said amendment confers no jurisdiction upon the Federal courts to supervise the administration by state tribunals of the criminal law of the state, to correct errors committed on trial, or to modify or change their judgments. *Id.*

#### UNITED STATES LAWS.

1891, chap. 517.  
*See In re Buchanan*, 264.

## USAGE.

See BANKS AND BANKING.

## USE AND OCCUPATION.

1. L. died in 1885, leaving defendant, his widow, and plaintiffs, his three children, who were all under the age of fourteen, him surviving. After such death the widow and children continued to live in the dwelling house of the deceased, she taking care of the children and acting toward them as natural guardian. W. was appointed their general guardian upon the petition of defendant; this stated that the infants resided in the house and that no rent arose therefrom. In 1891 W. procured himself to be appointed guardian *ad litem* for the children, and as such brought this action to recover for the use and occupation of the dwelling house. It appeared that soon after the appointment of W. as general guardian he agreed to allow defendant \$1,000 a year for the maintenance and clothing of the children. No agreement was made for the payment of rent by defendant and no demand was made therefor, until a few days before the commencement of the action, and up to that time W. not only acquiesced in defendant's residence in said house, but consented to and advised it, and defendant's evidence showed and the jury found that it was expressly agreed that no rent was to be charged. *Held*, that the action was not maintainable. *Lamb v. Lamb*. 317
2. *It seems*, that so far as the complaint should be held to be one under the statute (1 R. S. 748, § 2) to recover rent for the use and occupation the action could not be maintained without proof of an agreement, express or implied, to pay rent. *Id.*

## VACCINATION.

See HEALTH.

## VENDOR AND PURCHASER.

1. Where a sale of goods on credit has been induced by fraud on the

part of the purchaser, the vendor may, on discovery of the fraud, disaffirm the sale and follow the proceeds of the goods in the hands of a sheriff, who has levied upon and sold them by virtue of an execution against the purchaser. *Converse v. Sickles*. 200

2. Defendant, a sheriff, under executions against F. R. & Co., levied upon certain goods which had been sold on credit by plaintiff to that firm. Plaintiff, claiming that the sale was induced by fraud, disaffirmed the sale and brought an action of replevin to recover the goods. On trial of said action plaintiffs' counsel, in his opening, stated that he was unable to show that a demand upon defendant for a return of the goods was made and refused, and conceded that the goods had been taken by plaintiffs and disposed of. Thereupon, on motion of defendant's counsel, a verdict was rendered for defendant for a return of the goods, and assessing their value at a sum agreed upon, Judgment was entered and plaintiffs paid the amount thereof, but served on defendant a demand in writing for a return of the money, which they claimed as the proceeds of goods obtained from them by fraud. On refusal to return, this action was brought, plaintiffs claiming to charge defendant as trustee for the proceeds of their goods in his hands, and asking for an accounting and payment over of such proceeds. *Held*, that the judgment in the replevin suit was not conclusive against plaintiffs, either as *res adjudicata*, estoppel or a bar; that the decision was in effect simply that the action was prematurely brought, and there was no adjudication on the merits. *Id.*
3. Also, *held*, that it was immaterial that the moneys paid over to the sheriff were not the identical moneys received by plaintiffs for the goods; that as they were paid over as the proceeds they were to be so regarded. *Id.*

## VOTER.

See ELECTIONS.

WILL.

1. By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company, which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is hereinafter disposed of." By other clauses, down to the seventh, separate and distinct devises were made to a devisee named for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before-mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and a balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth

clause. *Held*, that the "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses, and which would go to the residuary legatees; and so, that said residuary legatees were entitled to the fund. *U. S. Trust Co. v. Black.* 1

2. Where a devise contains a clause, in terms a condition, that the devisee pay certain legacies, in the absence of any provision for re-entry or forfeiture, or of anything to support an inference that the testator intended the estate to depend upon performance of the requirement, the words used will be held to import a covenant, not a condition. *Cunningham v. Parker.* 29
3. D., by his will, after directing the payment of his debts by his executor, and after giving various legacies, devised and bequeathed all the residue of his estate, real and personal, to his son A., "on the condition and proviso that he pay" the said legacies within four years after the death of the testator, and the real estate so devised to A. was charged with the payment of the same. A. was appointed executor; he accepted the devise and went into possession of the real estate, but did not pay the legacies within the four years. At the death of D. his personalty was insufficient to pay his debts. In an action brought by creditors of the decedent under the Code of Civil Procedure (§ 1844, *et seq.*) to reach and apply the real estate to the payment of their debts, *held*, that the failure to pay the legacies did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the land so devised to him. *Id.*
4. Where a will is the subject of construction the intention of the testator, as disclosed by the will, not a general rule of construction, is to govern when they come in conflict. *In re James.* 78
5. By his will the testator gave to his wife "for her sole use, enjoy-

ment and benefit, during her life, without restraint, deduction or interference in any manner whatsoever," one-half of the income of all his property, "of every kind," during her life; the remainder of the income, and the estate itself, after the death of the wife, he gave to his "legal heirs," subject to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage. *Held* (BARTLETT, J., dissenting), that dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; that the intention of the testator was not to create a technical trust, but that his property should remain in specie for his widow's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it. *Id.*

6. The testator's partner in business died a few days before him. In an action brought by a firm creditor for the protection and distribution of the firm assets a receiver was appointed, who collected interest and dividends upon certain bonds and stocks. A judgment was rendered in said action settling the receiver's accounts and directing him to deliver over the assets to the widow, as executrix of the surviving partner. *Held*, that the judgment was not open to attack upon the accounting of the execu-

trix, and that she was entitled to treat as income the money collected by the receiver as dividends and interest and paid over to her. *Id.*

7. The will of C. directed his executors to divide one-half of his estate into as many equal shares as he should leave children him surviving, to collect the interest on each share and apply the same, or so much thereof as they might deem necessary, to the use of the child for whom the share was intended, and to accumulate the remainder until said child should become of age or sooner die, and upon the coming of age to pay over to him or her the accumulations, and thereafter to apply the whole interest and income to the use of said beneficiary during life; upon the death of a child before or after coming of age to transfer the share to his or her children, and in case of the death of a child leaving no issue to transfer the share to the testator's surviving issue. In an action brought by the executors for a judicial settlement of their accounts, it appeared that the testator left two children, both infants, one of whom died under age, intestate and unmarried. There had been a large accumulation of interest upon the share of the child so dying. *Held*, that until the death of the child the entire interest of her share vested at once when paid in, and only the time of payment over, or enjoyment, was postponed until majority; and so, that the administratrix of the deceased child was entitled to the accumulation. *Smith v. Parsons.*

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8. *It seems* that where a will so provides for the accumulation of interest on an infant's share during minority, the testator has power to make such disposition thereof, in case of the death of the infant during minority, as he may see fit; and so, may bequeath it to any person, whether a minor, or of full age. Such a provision is not violative of the statute providing that accumulations must be for the benefit of minors. *Id.*

9. Unless a residuary bequest is circumscribed by clear expressions and the title of the residuary legatee narrowed by words of unmistakable import, it will, to prevent intestacy, be construed so as to perform the office intended, *i. e.*, to dispose of all the residuary estate. *In re Miner.* 121

10. The holographic will of M., after various devises and bequests, among them a bequest to his wife of all his "household goods, furniture and fixtures and effects," contained a direction to his executors to sell and convey any and all of his real estate, not otherwise disposed of, and convert the same into personalty. The will then provided that after the aforementioned payment shall be made out of the avails of the real and personal estate the balance shall form part of the residuary estate. It was also provided that in case of failure of one of the bequests it shall form part of the residuary estate. Then followed a clause commencing as follows: "All the rest and residue of my estate, both real and personal, not heretofore disposed of, I give, bequeath and devise as follows: All my household goods, furniture and effects after the decease of myself and wife to." Following this were the names of the beneficiaries, three in number, and the method of distribution. The testator left a large estate; he had no children; the three beneficiaries had been taken into his family at an early age, and had grown up and were recognized as members of his family. *Held*, that the general plan of the will indicated the testator's intent to create a residuary estate, and to effectually dispose of the whole thereof; and so, that the general words of gift carried to the three persons named all of the residuary estate, notwithstanding the presence of the qualifying words, "as follows;" that the testator's intent in specifying the furniture, etc., which had, by the words of a previous clause, been absolutely given to his wife, was simply to limit that gift to a life estate. *Id.*

11. A suspension of the power of alienation as to real estate and of

absolute ownership as to personal property occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed. *Sawyer v. Cubby.* 192

12. A contingency attached to a legacy which will render it void as an unlawful suspension of the power of alienation, must be one that relates to the person who shall take, and who may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it may happen that there is no one who can alienate within that time. *Id.*

13. The will of S. contained a legacy payable to C. in case he paid during the testator's lifetime all assessments, dues and premiums upon any insurance on his life, taken for the benefit of, and payable to, A., his adopted son, and in case such insurance or some part thereof should be actually paid to A. one year from testator's death. The testator's residuary estate he gave to his executors in trust to pay the income thereof to A. until he arrived at the age of thirty-five years, and then to pay over to him the principal. In an action for the construction of this clause, *held*, that the bequest to C., although future and contingent, vested as a right upon the testator's death, and so was alienable by him; that while the trust covered the entire residue except the contingent estate bequeathed to C., and there was a suspension of the power of alienation during the existence of the trust, that the suspension was simply for the life of A. or for a shorter period; and that, therefore, there was no unlawful suspension of the power of alienation, and that the bequest was valid. *Id.*

#### WITNESS.

1. On the trial of an action upon an insurance policy one of the plaintiffs was permitted to testify that after the death of H. she delivered the policy to C., and stated at the time that her father had told her

- of the making of the alleged agreement between him and C., and that the latter admitted she made the agreement. C. was alive at the time of the trial. *Held*, that the evidence was properly received; that it was not incompetent under the provisions of the Code of Civil Procedure (§ 829) as it simply tended to prove an admission of C. against her interests, not a personal transaction or conversation between the witness and a deceased person. *Hirsh v. Auer*. 13
2. A son of C., who was not a party to the action or beneficiary under the agreement, was also called as a witness for plaintiffs as to conversations with his father. *Held*, that the witness was not so interested as to prevent his testifying. *Id.*
3. In an action for use and occupation, defendant was permitted to prove, under objection and exception, that just prior to the time when a witness made the demand for rent he had a quarrel with defendant in which he made threats against her. *Held*, no error; that the testimony was admissible as showing the feeling of the witness against defendant and so as affecting his credibility as a witness. *Lamb v. Lamb*. 817



stitutes part of the undertaking, and the party executing it consents that in case of forfeiture judgment may at once be entered thereon, upon which a general execution may be issued, and this constitutes a voluntary appearance in the action. Proceedings supplementary to execution issued upon such a judgment may, therefore, properly be instituted. *Id.*

### SUPREME COURT.

*See* CONDEMNATION OF REAL PROPERTY.

### SUPREME COURT RULES.

1. While under the Supreme Court rules (Rule 11) an oral stipulation in respect to the proceedings in a cause is not binding and will not be carried into effect by the court, it will not permit a party to be misled, deceived or defrauded by means thereof, and in cases where it has been acted upon by the party making it, he will not be permitted to retract and take advantage of the acts or omissions of his adversary induced thereby. *Mut. L. Ins. Co. N. Y. v. O'Donnell.* 275
2. *It seems*, where in such a case the question as to whether the alleged oral stipulation was made is contested, while the Special Term has power to determine it upon affidavits, where a large amount is involved and the conflict is sharp, the question should be determined upon common-law evidence. *Id.*

### SURETY.

1. The liability of a surety upon an undertaking, in the form prescribed by the Code of Civil Procedure (§§ 1352, 1356), given to stay proceedings on appeal from a final judgment to the General Term of the Supreme Court, is not terminated by the reversal of the judgment by the General Term, but continues and is enforceable in case of the ultimate affirmance of the judgment by this court on appeal from the

order of General Term. *Foo Long v. Am. Surety Co.* 251

2. Upon appeal to the General Term from a judgment in favor of plaintiff on trial at Circuit such an undertaking was given. The judgment was reversed and a new trial granted. After an appeal to this court from an order of General Term, and after a return had been made and the appeal noticed for argument, the parties stipulated that a judgment should be entered reversing the order of the General Term and affirming absolutely the judgment. On reading and filing said stipulation this court, without argument or consideration of the case on its merits, reversed the order and affirmed the judgment. The usual remittitur was sent down and judgment entered in accordance therewith. In an action upon the undertaking, *held*, that there was not an affirmance of the original judgment within the true intent and meaning of the undertaking, but in substance the original judgment was reinstated by consent of the parties; that the undertaking referred to a reversal or dismissal of the appeal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent. *Id.*

### SURROGATES.

1. Under the provision of the Code of Civil Procedure (§ 2545), declaring that a surrogate's decree "shall not be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," an appellate court is at liberty to disregard such an error if it could have had no influence upon the determination of the case. *In re Miner.* 121
2. Upon the death of J. letters of administration were issued to P. upon her estate, upon his petition, in which he alleged that he was J.'s surviving husband. No notice was given to the next of kin, and there was no appearance by them. P. filed his account, which was



settled by the surrogate, who awarded payment of the whole surplus to him as husband. Subsequently the next of kin filed a petition alleging that P. was never married to J. and asking to have the decree on the accounting set aside and the assets paid over to them. The evidence showed and the surrogate found that P. never had been the husband of the intestate and ordered that the letters of administration and the decree be revoked and vacated. On appeal the General Term reversed that portion of the surrogate's order which revoked the letters, on the sole ground that no such relief was asked for, but affirmed that portion vacating the decree. On appeal here it was claimed by P. that the unrevoked letters were conclusive proof of P.'s title as husband. *Held*, untenable; that while the unrevoked order appointing P. as administrator was conclusive as to his authority to act there was no estoppel making the reason which led to the granting the order a fact conclusively established as against the next of kin, who were not notified and did not appear; that they could waive their right to attack the order, and it could stand consistently with the relief asked for and granted. *In re Patterson*. 827

## SUSPENSION OF POWER OF ALIENATION.

1. A suspension of the power of alienation as to real estate and of absolute ownership as to personal property occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed. *Sawyer v. Cuddy*. 192
2. A contingency attached to a legacy which will render it void as an unlawful suspension of the power of alienation, must be one that relates to the person who shall take, and who may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it may happen that there is no one who can alienate within that time. *Id.*

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8. The will of S. contained a legacy payable to C. in case he paid during the testator's lifetime all assessments, dues and premiums upon any insurance on his life, taken for the benefit of, and payable to, A., his adopted son, and in case such insurance or some part thereof should be actually paid to A. one year from the testator's death. The testator's residuary estate he gave to his executors in trust to pay the income thereof to A. until he arrived at the age of thirty-five years, and then to pay over to him the principal. In an action for the construction of this clause, *held*, that the bequest to C., although future and contingent, vested as a right upon the testator's death, and so was alienable by him; that while the trust covered the entire residue except the contingent estate bequeathed to C., and there was a suspension of the power of alienation during the existence of the trust, that the suspension was simply for the life of A. or for a shorter period; and that, therefore, there was no unlawful suspension of the power of alienation, and that the bequest was valid. *Id.*

## TAX.

*See ASSESSMENT AND TAXATION.*

## TORT.

*See NEGLIGENCE.*

## TOWNS.

1. Under the provisions of the "Highway Law" (§ 180, chap. 568, Laws of 1890), fixing the liability for the expenses of the construction and repair of public free bridges as between a town and county, the right of a town to demand contribution from the county when the bridge expenditure of the town is in excess of one-sixth of one per cent of the assessed valuation of its taxable property, is not limited to expenditures for bridges which cross streams forming boundaries of the town, but applies as well to bridges erected

wholly within the town. *People ex rel. Root v. Bd. Supra.* 107

2. In proceedings by mandamus to compel the county of Steuben to levy a tax to pay the proportion alleged to be due from it under said act of the expense incurred by the town of Addison for the repair and construction of bridges, it appeared that a portion of the expenditure was for the construction of a bridge in the village of Addison in said town. By the village charter the bridge was excepted from the jurisdiction of the village authorities, and left under the control of the commissioners of highways of the town. It was claimed by the board of supervisors that the bridge was not a town bridge within the statute. *Held*, untenable. *Id.*

#### TRIAL.

The General Term, in reversing an order granting a new trial, held that the verdict could stand upon the ground of negligence of a driver in driving boys from a car when in motion. *Held*, error; that as this was not presented to the jury, and they were not permitted to consider it, the verdict could not be sustained on that ground; that if sustainable it must be sustained on the ground upon which the case was submitted. *Marks v. Rochester Ry. Co.* 181

See, also, *People v. Leach.* 392

#### TRUSTS AND TRUSTEES.

1. By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company, which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is here-

inafter disposed of." By other clauses, down to the seventh, separate and distinct devises were made to a devisee named for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and a balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth clause. *Held*, that the "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses, and which would go to the residuary legatees; and so, that said residuary legatees were entitled to the fund. *U. S. Trust Co. N. Y. v. Black.* 1

2. Trusts may be created in personal property by parol, and to accomplish this no particular form of words is necessary. *Hirsh v. Auer.*

8. It is not material that the trust agreement deals with a contingent interest; when the interest becomes vested and the trustee receives the fund the trust attaches to it. *Id.*

4. H., the father of plaintiffs, at the time of his death held a policy or certificate of insurance on his life for \$2,000, payable, and which was paid, to his sister, C., the original defendant and the present defendant's testatrix. In an action to recover the amount so paid plaintiffs proved a parol agreement between H. and C., to the effect that when she collected the policy she would expend not to exceed \$500 thereof for his funeral expenses, etc., and would divide the balance equally between plaintiffs, who were his children. *Held*, that the agreement was valid; that C. received the amount of the insurance impressed with the trust created by the agreement, and so that a verdict was properly rendered for the \$1,500. *Id.*

#### UNDERTAKING.

1. The liability of a surety upon an undertaking, in the form prescribed by the Code of Civil Procedure (§§ 1352, 1356), given to stay proceedings on appeal from a final judgment to the General Term of the Supreme Court, is not terminated by the reversal of the judgment by the General Term, but continues and is enforceable in case of the ultimate affirmance of the judgment by this court on appeal from the order of General Term. *Foo Long v. Am. Surety Co.* 251

2. Upon appeal to the General Term from a judgment in favor of plaintiff on trial at Circuit such an undertaking was given. The judgment was reversed and a new trial granted. After an appeal to this court from an order of General Term, and after a return had been made and the appeal noticed for argument, the parties stipulated that a judgment should be entered reversing the order of the General Term and affirming absolutely the

judgment. On reading and filing said stipulation, this court, without argument or consideration of the case on its merits, reversed the order and affirmed the judgment. The usual remittitur was sent down and judgment entered in accordance therewith. In an action upon the undertaking, *held*, that there was not an affirmance of the original judgment within the true intent and meaning of the undertaking, but in substance the original judgment was reinstated by consent of the parties, that the undertaking referred to a reversal or dismissal of the appeal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent. *Id.*

#### UNITED STATES CONSTITUTION.

1. *It seems*, it was not the purpose of the fourteenth amendment to the United States Constitution, declaring that no state shall "deprive any person of life, liberty or property without due process of law," to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of those courts over crimes and offenses, defined and declared by its laws, and committed within its territorial jurisdiction. *In re Buchanan.* 264

2. *It seems*, also, that while in case of accusation of crime the accused is entitled to an inquiry, a hearing and a judgment before he can be deprived by sentence of his liberty or life, within these limitations what constitutes "due process of law" is to be determined by the state in every case where it can exercise rightful authority, and said amendment confers no jurisdiction upon the Federal courts to supervise the administration by state tribunals of the criminal law of the state, to correct errors committed on trial, or to modify or change their judgments. *Id.*

#### UNITED STATES LAWS.

1891, chap. 517.  
*See In re Buchanan*, 264.

## USAGE.

See BANKS AND BANKING.

## USE AND OCCUPATION.

1. L. died in 1885, leaving defendant, his widow, and plaintiffs, his three children, who were all under the age of fourteen, him surviving. After such death the widow and children continued to live in the dwelling house of the deceased, she taking care of the children and acting toward them as natural guardian. W. was appointed their general guardian upon the petition of defendant; this stated that the infants resided in the house and that no rent arose therefrom. In 1891 W. procured himself to be appointed guardian *ad litem* for the children, and as such brought this action to recover for the use and occupation of the dwelling house. It appeared that soon after the appointment of W. as general guardian he agreed to allow defendant \$1,000 a year for the maintenance and clothing of the children. No agreement was made for the payment of rent by defendant and no demand was made therefor, until a few days before the commencement of the action, and up to that time W. not only acquiesced in defendant's residence in said house, but consented to and advised it, and defendant's evidence showed and the jury found that it was expressly agreed that no rent was to be charged. *Held*, that the action was not maintainable. *Lamb v. Lamb*. 317
2. *It seems*, that so far as the complaint should be held to be one under the statute (1 R. S. 748, § 2) to recover rent for the use and occupation the action could not be maintained without proof of an agreement, express or implied, to pay rent. *Id.*

## VACCINATION.

See HEALTH.

## VENDOR AND PURCHASER.

1. Where a sale of goods on credit has been induced by fraud on the

part of the purchaser, the vendor may, on discovery of the fraud, disaffirm the sale and follow the proceeds of the goods in the hands of a sheriff, who has levied upon and sold them by virtue of an execution against the purchaser. *Converse v. Sickles*. 200

2. Defendant, a sheriff, under executions against F. R. & Co., levied upon certain goods which had been sold on credit by plaintiff to that firm. Plaintiff, claiming that the sale was induced by fraud, disaffirmed the sale and brought an action of replevin to recover the goods. On trial of said action plaintiffs' counsel, in his opening, stated that he was unable to show that a demand upon defendant for a return of the goods was made and refused, and conceded that the goods had been taken by plaintiffs and disposed of. Thereupon, on motion of defendant's counsel, a verdict was rendered for defendant for a return of the goods, and assessing their value at a sum agreed upon. Judgment was entered and plaintiffs paid the amount thereof, but served on defendant a demand in writing for a return of the money, which they claimed as the proceeds of goods obtained from them by fraud. On refusal to return, this action was brought, plaintiffs claiming to charge defendant as trustee for the proceeds of their goods in his hands, and asking for an accounting and payment over of such proceeds. *Held*, that the judgment in the replevin suit was not conclusive against plaintiffs, either as *res adjudicata*, estoppel or a bar; that the decision was in effect simply that the action was prematurely brought, and there was no adjudication on the merits. *Id.*
3. Also, *held*, that it was immaterial that the moneys paid over to the sheriff were not the identical moneys received by plaintiffs for the goods; that as they were paid over as the proceeds they were to be so regarded. *Id.*

## VOTER.

See ELECTIONS.

WILL.

1. By the third clause of the will of D. she directed the sale of certain of her real estate, and after payment of a bond described, that the balance of the proceeds be deposited with plaintiff, a trust company, which was directed to hold and invest the same and pay to E. the income thereof during his life. In case of the death of E. without lawful issue the testatrix provided as follows: "I order and direct that the principal of said trust fund shall form part of my residuary estate, and the same be disposed of as the same is hereinafter disposed of." By other clauses, down to the seventh, separate and distinct devises were made to a devisee named for life with remainder to others, and in reference to each, in case of lapse or failure to take, it was provided that the devise should fall into and be disposed of as part of the residuary estate. By the seventh clause the testatrix directed that "all the rest, residue and remainder" of her estate be sold, and out of the proceeds the executors were directed to pay certain legacies specified. A trust fund was also created for the life of a beneficiary named, with the direction that on her death the trust fund should fall into and be disposed of as part of the residuary estate. By the eighth clause it was provided that after the payment of the before-mentioned legacies the executors should pay "out of the residue of the proceeds of sale" of the "residuary estate" certain other legacies specified, and then the clause directed the executors to pay over "all the rest and residue" of the "residuary estate" not otherwise disposed of to certain residuary legatees named. In an action for the construction of the will it appeared that the real estate specified in the third clause was sold, the bond therein referred to paid and a balance of the purchase money deposited with plaintiff as directed; that the property of the testatrix, other than that specified in the clause preceding the seventh, was sold, but that nothing was left of the avails to pay the specific bequests in the eighth

clause. *Held*, that the "residuary estate" referred to in the third clause was that which the testatrix assumed would remain after payment of the specific legacies referred to in the seventh and eighth clauses, and which would go to the residuary legatees; and so, that said residuary legatees were entitled to the fund. *U. S. Trust Co. v. Black.* 1

2. Where a devise contains a clause, in terms a condition, that the devisee pay certain legacies, in the absence of any provision for re-entry or forfeiture, or of anything to support an inference that the testator intended the estate to depend upon performance of the requirement, the words used will be held to import a covenant, not a condition. *Cunningham v. Parker.* 29
3. D., by his will, after directing the payment of his debts by his executor, and after giving various legacies, devised and bequeathed all the residue of his estate, real and personal, to his son A., "on the condition and proviso that he pay" the said legacies within four years after the death of the testator, and the real estate so devised to A. was charged with the payment of the same. A. was appointed executor; he accepted the devise and went into possession of the real estate, but did not pay the legacies within the four years. At the death of D. his personalty was insufficient to pay his debts. In an action brought by creditors of the decedent under the Code of Civil Procedure (§ 1844, *et seq.*) to reach and apply the real estate to the payment of their debts, *held*, that the failure to pay the legacies did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the land so devised to him. *Id.*
4. Where a will is the subject of construction the intention of the testator, as disclosed by the will, not a general rule of construction, is to govern when they come in conflict. *In re James.* 78
5. By his will the testator gave to his wife "for her sole use, enjoy-

ment and benefit, during her life, without restraint, deduction or interference in any manner whatsoever," one-half of the income of all his property, "of every kind," during her life; the remainder of the income, and the estate itself, after the death of the wife, he gave to his "legal heirs," subject to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage. *Held* (BARTLETT, J., dissenting), that dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; that the intention of the testator was not to create a technical trust, but that his property should remain in specie for his widow's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it. *Id.*

6. The testator's partner in business died a few days before him. In an action brought by a firm creditor for the protection and distribution of the firm assets a receiver was appointed, who collected interest and dividends upon certain bonds and stocks. A judgment was rendered in said action settling the receiver's accounts and directing him to deliver over the assets to the widow, as executrix of the surviving partner. *Held*, that the judgment was not open to attack upon the accounting of the execu-

trix, and that she was entitled to treat as income the money collected by the receiver as dividends and interest and paid over to her. *Id.*

7. The will of C. directed his executors to divide one-half of his estate into as many equal shares as he should leave children him surviving, to collect the interest on each share and apply the same, or so much thereof as they might deem necessary, to the use of the child for whom the share was intended, and to accumulate the remainder until said child should become of age or sooner die, and upon the coming of age to pay over to him or her the accumulations, and thereafter to apply the whole interest and income to the use of said beneficiary during life; upon the death of a child before or after coming of age to transfer the share to his or her children, and in case of the death of a child leaving no issue to transfer the share to the testator's surviving issue. In an action brought by the executors for a judicial settlement of their accounts, it appeared that the testator left two children, both infants, one of whom died under age, intestate and unmarried. There had been a large accumulation of interest upon the share of the child so dying. *Held*, that until the death of the child the entire interest of her share vested at once when paid in, and only the time of payment over, or enjoyment, was postponed until majority; and so, that the administratrix of the deceased child was entitled to the accumulation. *Smith v. Parsons*. 116

8. *It seems* that where a will so provides for the accumulation of interest on an infant's share during minority, the testator has power to make such disposition thereof, in case of the death of the infant during minority, as he may see fit; and so, may bequeath it to any person, whether a minor, or of full age. Such a provision is not violative of the statute providing that accumulations must be for the benefit of minors. *Id.*

9. Unless a residuary bequest is circumscribed by clear expressions and the title of the residuary legatee narrowed by words of unmistakable import, it will, to prevent intestacy, be construed so as to perform the office intended, *i. e.*, to dispose of all the residuary estate. *In re Miner.* 121

10. The Holographic will of M., after various devises and bequests, among them a bequest to his wife of all his "household goods, furniture and fixtures and effects," contained a direction to his executors to sell and convey any and all of his real estate, not otherwise disposed of, and convert the same into personalty. The will then provided that after the aforementioned payment shall be made out of the avails of the real and personal estate the balance shall form part of the residuary estate. It was also provided that in case of failure of one of the bequests it shall form part of the residuary estate. Then followed a clause commencing as follows: "All the rest and residue of my estate, both real and personal, not heretofore disposed of, I give, bequeath and devise as follows: All my household goods, furniture and effects after the decease of myself and wife to." Following this were the names of the beneficiaries, three in number, and the method of distribution. The testator left a large estate; he had no children; the three beneficiaries had been taken into his family at an early age, and had grown up and were recognized as members of his family. *Held*, that the general plan of the will indicated the testator's intent to create a residuary estate, and to effectually dispose of the whole thereof; and so, that the general words of gift carried to the three persons named all of the residuary estate, notwithstanding the presence of the qualifying words, "as follows;" that the testator's intent in specifying the furniture, etc., which had, by the words of a previous clause, been absolutely given to his wife, was simply to limit that gift to a life estate. *Id.*

11. A suspension of the power of alienation as to real estate and of

absolute ownership as to personal property occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed. *Sawyer v. Cubby.* 192

12. A contingency attached to a legacy which will render it void as an unlawful suspension of the power of alienation, must be one that relates to the person who shall take, and who may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it may happen that there is no one who can alienate within that time. *Id.*

13. The will of S. contained a legacy payable to C. in case he paid during the testator's lifetime all assessments, dues and premiums upon any insurance on his life, taken for the benefit of, and payable to, A., his adopted son, and in case such insurance or some part thereof should be actually paid to A. one year from testator's death. The testator's residuary estate he gave to his executors in trust to pay the income thereof to A. until he arrived at the age of thirty-five years, and then to pay over to him the principal. In an action for the construction of this clause, *held*, that the bequest to C., although future and contingent, vested as a right upon the testator's death, and so was alienable by him; that while the trust covered the entire residue except the contingent estate bequeathed to C., and there was a suspension of the power of alienation during the existence of the trust, that the suspension was simply for the life of A. or for a shorter period; and that, therefore, there was no unlawful suspension of the power of alienation, and that the bequest was valid. *Id.*

WITNESS.

1. On the trial of an action upon an insurance policy one of the plaintiffs was permitted to testify that after the death of H. she delivered the policy to C., and stated at the time that her father had told her

- of the making of the alleged agreement between him and C., and that the latter admitted she made the agreement. C. was alive at the time of the trial. *Held*, that the evidence was properly received; that it was not incompetent under the provisions of the Code of Civil Procedure (§ 829) as it simply tended to prove an admission of C. against her interests, not a personal transaction or conversation between the witness and a deceased person. *Hirsh v. Auer*. 13
2. A son of C., who was not a party to the action or beneficiary under the agreement, was also called as a witness for plaintiffs as to conversations with his father. *Held*, that the witness was not so interested as to prevent his testifying. *Id.*
8. In an action for use and occupation, defendant was permitted to prove, under objection and exception, that just prior to the time when a witness made the demand for rent he had a quarrel with defendant in which he made threats against her. *Held*, no error; that the testimony was admissible as showing the feeling of the witness against defendant and so as affecting his credibility as a witness. *Lamb v. Lamb*. 817







